(14)

No. 96-370-CFX
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Docketed:
September 12, 1996

Title: Bay Area Laundry and Dry Cleaning Pension Trust Fund, Petitioner
v.
Ferbar Corporation of California, Inc., and Stephen Barnes

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Berzon,Marsha S.

Counsel for respondent: Terheyden,William F.

Entry	Date	Note	Proceedings and Orders
1	Jul 29 1996	G	Application (A96-69) to extend the time to file a petition for a writ of certiorari from August 11, 1996 to October 10, 1996, submitted to Justice O'Connor.
2	Aug 1 1996		Application (A96-69) granted by Justice O'Connor extending the time to file until September 10, 1996.
3	Sep 10 1996	G	Petition for writ of certiorari filed. (Response due October 12, 1996)
4	Oct 11 1996	G	Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae filed.
5	Oct 15 1996	G	Motion of Central States, SE and SW Areas Pension Fund for leave to file a brief as amicus curiae filed.
6	Oct 15 1996		Brief of respondents Ferbar Corporation of California, Inc.,and Stephen Barnes in opposition filed.
7	Oct 30 1996		DISTRIBUTED. November 15, 1996 (Page 2)
8	Nov 18 1996		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae GRANTED.
9	Nov 18 1996		Motion of Central States, SE and SW Areas Pension Fund for leave to file a brief as amicus curiae GRANTED.
10	Nov 18 1996	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
12	Apr 21 1997	X	Brief amicus curiae of United States filed.
11	Apr 22 1997		REDISTRIBUTED. May 8, 1997 (Page 11)
13	May 12 1997		Petition GRANTED. SET FOR ARGUMENT November 10, 1997. **********
15	Jun 2 1997		Order extending time to file brief of petitioner on the merits until July 17, 1997.
16	Jul 16 1997		Joint appendix filed.
17	Jul 16 1997	G	Motion of Nat. Coordinating Committee for Multiemployer Plans, et al. for leave to file a brief as amici curiae filed.
18	Jul 17 1997	G	Motion of Midwest Motor Express, Inc. for leave to file a brief as amicus curiae filed.
19	Jul 17 1997	G	Motion of John T. Joyce, et al. for leave to file a brief as amici curiae filed.
20	Jul 17 1997		Brief amicus curiae of United States filed.
21	Jul 17 1997		Brief of petitioner Bay Area Laundry and Dry Cleaning Pensiion Trust Fund filed.

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Entry	Date	Note	Proceedings and Orders
23	Jul 25 1997		Order extending time to file brief of respondent on the merits until September 10, 1997.
27	Sep 11 1997		Brief of respondents Ferbar Corporation of California, Inc. and Stephen J. Barnes in opposition filed.
24	Sep 12 1997		Motion of Nat. Coordinating Committee for Multiemployer Plans, et al. for leave to file a brief as amici curiae GRANTED.
25	Sep 12 1997		Motion of Midwest Motor Express, Inc. for leave to file a brief as amicus curiae GRANTED.
26	Sep 12 1997		Motion of John T. Joyce, et al. for leave to file a brief as amici curiae GRANTED.
28	Sep 16 1997		CIRCULATED.
29	Sep 18 1997	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Sep 24 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
30	Sep 29 1997		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Oct 14 1997	X	Reply brief of petitioner Bay Area Laundry and Dry Cleaning Pension Trust Fund filed.
33	Oct 14 1997		Record filed.
		*	Original record proceedings United States District Court for the Northern District of California.
34	Nov 10 1997		ARGUED.

(1)

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No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action for recovery of withdrawal liability under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1451, arises: (a) on the date an employer withdraws from the plan; (b) on the date the first payment becomes overdue; (c) for each payment due, on the date that payment becomes overdue, unless the plan sponsor elects to invoke the statutory provision permitting acceleration of the entire withdrawal liability debt after default; or (d) on some other date.

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OCTOBER TERM, 1996

No. 96- ——

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

The Board of Trustees of the Bay Area Laundry and Dry Cleaning Pension Trust Fund ("Trustees"), the plaintiff in the district court and the appellant in the Court of Appeals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 73 F.3d 971 and is reprinted as Appendix A to this Petition (App.), at App. 1a-5a. The opinion of the United States District Court for the Northern District of California is unreported and appears as Appendix B, at App. 6a-19a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing on May 13, 1996. App. 20a. On August 1, 1996, Justice O'Connor extended the time within which to file the petition for writ of certiorari to and including September 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes and regulations involved are set forth in Appendix E to the Petition, App. 30a-49a.

STATEMENT OF THE CASE

1. The Statutory Scheme

The Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. § 1001 *et seq.*,[1] as amended by the Multiemployer Pension Plan Amendments Act of 1980, requires an employer withdrawing from a multiemployer pension plan to pay its share of any unfunded vested pension obligations. § 1399(b)(1). An employer ordinarily completely withdraws from a multiemployer plan when it permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan. § 1383(a).[2] The amortized withdrawal liability payments are calculated by the fund and assessed to the withdrawing employer according to a schedule set up by the fund but in large part dictated by the statute, with payments to begin within sixty days after the fund demands payment. § 1399(c)(2).[3]

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[1] All subsequent statutory citations are to Title 29 of the United States Code unless otherwise indicated.

[2] There are special complete withdrawal provisions covering certain industries and circumstances. *See* n.6 and p. 12, *infra*.

[3] The multiple and complex calculations that must be performed by the plan's actuary in order to assess withdrawal liability are described in *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 609-10 (1993).

Within 90 days after receiving the plan sponsor's notice of withdrawal liability, the employer may ask the plan sponsor to review the determination of liability or the schedule of payments, or both. § 1399(b)(2)(A)(i). After this review, any dispute concerning the demand is subject to arbitration (§ 1401(a)(1)): Within 60 days after (a) the plan sponsor's response to the employer's request for review or (b) 120 days after the employer's request for review, whichever is earlier, the employer may initiate arbitration. § 1401(a)(1). While the arbitration proceeds, the employer must make periodic interim payments according to the schedule set forth by the plan sponsor. §§ 1399(c)(2), 1401(d).

If the employer does not meet its withdrawal liability obligations, the statute provides a cause of action by the plan trustees:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both. [§ 1451(a)(1)]

As to the limitations question, the critical statutory section provides:

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action. [§ 1451(f)]

The issue in this case is when the statute of limitations established by § 1451(f) begins to run on a cause of action for failure to make withdrawal liability payments.

2. Facts

Ferbar Corporation ("Ferbar" or "the employer") contributed to the Bay Area Laundry and Dry Cleaning Pension Fund ("Trustees" or "Fund") for several years for three business locations, but ceased all contributions on or about March 1, 1985. CR. 13 at 1-2.[4]

On December 12, 1986, the Fund assessed withdrawal liability against Superior French Laundry, one of the three laundries operated by Ferbar, in the amount of $45,580.80. CR. 13 at 2. The assessment notice gave Ferbar a choice between a single lump-sum payment of the total withdrawal liability by February 10, 1987, and monthly installment payments of $345.50 commencing February 1, 1987. The notice also stated that the employer would be deemed in "default" if any delinquency were not cured within 60 days after notice of delinquency, and that Ferbar was required by law to make the payments as scheduled notwithstanding any request for review or appeal. CR 15, Exh. 1.

By letter dated February 27, 1987, Ferbar exercised its right to request review of the assessment by the Trustees. CR. 16, Exh. 2. During the pendency of the review, Ferbar made no payments on its withdrawal liability. CR. 13 at 3.

Having received no withdrawal liability payments, the Fund, on April 14, 1987, notified Ferbar of the delinquency. CR. 16, Exh. 3. The delinquency notice stated that Ferbar had sixty days to cure the delinquency, or it would be in "default," in which case liability for the full amount of outstanding withdrawal liability could be accel-

[4] These facts were accepted as true for purposes of summary judgment.

erated. And the notice of delinquency notified Ferbar once again that ERISA required it to make the scheduled payments notwithstanding any request Ferbar might make for review or appeal of the Fund's determination.

Ferbar did not cure its delinquency after receiving the delinquency notice, but did, on July 8, 1987, request arbitration of its disputed withdrawal liability. CR 16, Exh. 4. Ferbar made no payments of withdrawal liability at any time.

3. Proceedings

The Trustees filed their complaint for collection of unpaid withdrawal liability on February 9, 1993, eight days more than six years after the first withdrawal liability payment was due under the assessment but less than six years after any other payment of the withdrawal liability was due, and less than six years after the entire amount of the withdrawal liability could have been demanded under the assessment *or* the statute. CR. 1. Ferbar answered on March 23, 1993. CR. 3. Thereafter, Ferbar filed a Motion for Summary Judgment based solely on failure to meet the applicable statute of limitations, and the Trustees filed a cross-motion for summary judgment. CR. 10, 14.

The District Court held that the Trustees' action was time-barred under the three-year "discovery" statute of limitations set forth in § 1451(f)(2), notwithstanding the express language in the statute providing that the applicable limitations period is "the later of" the three-year discovery period in § 1451(f)(2) or the six-year accrual period in § 1451(f)(1). Alternatively, the District Court held that the Trustees' action was also time-barred under the six-year limitations period in § 1451(f)(1), concluding that the Trustees' cause of action arose, and the limitations period on the entire amount of the withdrawal liability began to run, on February 1, 1987, when Ferbar failed to make the first installment payment on the date scheduled by the Fund.

On appeal, the Ninth Circuit held that the District Court had erred by applying the three-year discovery limitations period in § 1451(f)(2). The Ninth Circuit affirmed the judgment, however, holding that the action was time-barred under the six-year limitations period of § 1451 (f)(1).

Unlike the District Court, which had viewed the cause of action as arising on the date of the first missed payment, the Ninth Circuit ruled that a cause of action under § 1383(a) accrues, and the limitations period of § 1451 (f)(1) begins to run, on the date on which an employer completely withdraws from a plan. In so holding, the court relied upon its own decision in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), a case construing the relationship between a different withdrawal liability subsection of the statute, § 1383(b), and the statute of limitations provision, § 1451(f).[5] Because Ferbar had effected a complete withdrawal from the Fund more than six years before the Trustees' action was filed, the Ninth Circuit affirmed the summary judgment for Ferbar. App. 5a.

Judge Trott concurred reluctantly, stating that he was compelled to join in the judgment by the court's previous decision in *Thibodo*. In his concurrence, Judge Trott, noting that the D.C. Circuit had, in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.); *cert. denied*, 493 U.S. 918 (1989) decided the same statute of limitations issue differently than the Ninth Circuit did in this case, expressed the view that *Joyce* "does a better job of answering the questions raised by these issues . . . ." App. 5a.

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[5] The *Thibodo* opinion appears in Appendix D to this Petition, at App. 21a.

REASONS FOR GRANTING THE PETITION

This case presents the Court with an opportunity to resolve a serious and multifaceted disagreement among the circuits on the application of the statute of limitations governing actions by multiemployer pension benefit plans to recover ERISA withdrawal liability payments.

The Ninth Circuit held that the § 1451(f)(1) limitations period begins to run on the date that the employer completely withdraws from a multiemployer pension fund. It so held even though, as this Court recognized last year in *Milwaukee Brewery Workers v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S.Ct. 981 (1995), the statute does *not* impose any obligation on the employer to make any payment on the date of withdrawal. Instead, the statute simply uses that date in assessing the amount and number of payments due to be paid by the employer considerably later, after the plan calculates the total amount due, sets out the required payment schedule, and makes a demand for payment. 115 S.Ct. at 988. Thus, according to the Ninth Circuit, the statute of limitations on a suit to collect withdrawal liability begins to run well before the plan trustees can file such a suit.

The four other circuits that have ruled on the limitations period applicable to collection of withdrawal liability all disagree with the Ninth Circuit on this point. Those circuits hold instead that the statute of limitations begins to run from the date when the plan trustees first can bring suit on the claims, not months or years before that. Since, under the complex statutory system for assessing and collecting withdrawal liability reviewed in *Schlitz*, the right to file a collection action arises only after withdrawal liability has been assessed and payment is due, all four of the other circuits hold that the statute of limitations under § 1451(f)(1) begins to run only then. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123-24, *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 172 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Board of Trustees of the Dist. No. 15,*

Machinists Pension Fund v. Kahle Eng'g. Corp., 43 F.3d 852, 859-61 (3d Cir. 1994); *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1, 3-4 (1st Cir. 1996).

At the same time, those circuits are in discord among themselves as to precisely how the limitations period applies once there has been the requisite statutory demand for payment: The Seventh and Third Circuits are directly at odds concerning whether, as the district court in this case held, the limitations period for the entire amount of withdrawal liability runs from the first missed payment or whether, instead, there is a separate limitations period running from each missed payment unless and until the multiemployer plan exercises its statutory option to accelerate the withdrawal payment obligation because of default. *Compare Navco, supra* (single limitations period for entire amount), with *Kahle Engineering Corp., supra* (separate period for each missed payment unless the payment obligation is accelerated after default).

The various interpretations of the statutory limitations period adopted by the circuits yield widely varying results on the same facts. In this case, for example, the action for collection of withdrawal liability is timely under the District of Columbia Circuit's interpretation of § 1451 (f)(1) adopted in *Joyce v. Clyde Sandoz Masonry* and the Third Circuit's interpretation adopted in *Kahle Engineering Corp.*, but is untimely under the Ninth Circuit's rule in this case and under the very different statutory interpretation reached by the Seventh Circuit in *Navco*.

As Congress recognized in enacting ERISA, many funds operate in broad geographical areas and are hampered in their operations if subject to varying rules with regard to such basic functions as the collection of funds necessary to assure fund solvency. For that reason, assuring uniformity in the rules governing employee benefit plans is a central purpose of ERISA. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98-100 (1983).

Because of the current disarray on the MPPAA withdrawal liability limitations issue among the circuits, the many pension plans that operate within the jurisdiction of more than one of the five circuits which have spoken to this issue must have administrative systems in the various circuits operating under different time lines for the purpose of assessing and collecting withdrawal liability. To eliminate this disruptive disparity in the application of § 1451(f), this Court should grant certiorari and, as it has in two other recent cases raising issues concerning the assessment and collection of withdrawal liability under the MPPAA (*Schlitz, supra* and *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993)), announce a uniform rule applicable to all multiemployer pension plans wherever they operate.

1. The Ninth Circuit, alone of the five circuits that have addressed the issue, holds that for purposes of the time limitations governing actions for recovery of withdrawal liability, a Fund's cause of action arises under that section on the day the employer permanently withdraws from the plan. App. 5a. As the other four circuits that have addressed the question have recognized, this result simply cannot be squared with the statutory scheme as a whole.

A. As *Schlitz* explained, the MPPAA "imposed a withdrawal charge on all employers withdrawing from an underfunded plan . . . [a]nd set forth a detailed set of rules for determining, and collecting, that charge." 115 S.Ct. at 985. The calculation of that charge is triggered once there has been a "complete withdrawal from a multiemployer plan," which occurs ordinarily when an employer "permanently ceases to have an obligation to contribute under the plan, or . . . permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a); *Concrete Pipe*, 508 U.S. at 610.[6]

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[6] There are special provisions for determining complete withdrawal in certain industries. § 1383(b), (c), (d) and (f); *see* p. 12, *infra*.

No obligation to pay wtihdrawal liability arises, however, on the date the withdrawal is deemed to occur. Rather, as this Court noted in *Schlitz*, while "[t]he statute . . . might make the withdrawing employer pay (or begin payment) on the date the employer actually withdraws . . . it does not do so." 115 S.Ct. at 987. Instead, the language in § 1399(b)(1) and (c)(2) "makes clear that the withdrawing employer owes nothing until its plan demands payment . . . ." *Id.* at 988; *see also id.* at 987 (noting that "[t]he statute says that a plan must draw up a schedule for payment and 'demand payment' as 'soon as practicable' after withdrawal . . . [and] adds that '[w]ithdrawal liability shall be payable . . . no more than 60 days after the date of the demand.' 29 U.S.C. § 1399(c)(2).")[7]

It is only once the withdrawal liability payments are "due and owing on the schedule set forth by the plan sponsor" that "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." § 1401(b)(1). Section 1451, in turn, provides that a plan fiduciary "adversely affected by the act or omission of any party . . . with respect to a multiemployer plan . . . may bring an action . . . six years after the date on which the cause of action arose." 29 U.S.C. § 1451(a)(1) and (f)(1).

[7] As *Schlitz* also explains, the statute requires that the plan permit the withdrawal liability to be paid either in a lump sum or in equal installments, and prescribes the method according to which the amount of each installment and the number of installments is to be calculated. Then, to be more precise than the Court had reason to be in *Schlitz*, the statute provides that "[w]ithdrawal liability shall be payable in accord with the schedule set forth by the plan . . . beginning no later than 60 days after the date of the demand." 29 U.S.C. § 1399(c)(2). As we explain later, the employer has no obligation to pay the *total* amount of the withdrawal liability any sooner than the mandatory installment plan payment schedule provides, unless the plan elects to accelerate the payment schedule to demand full payment because of payment default. *See* pp. 15-19, *infra*.

Given this statutory scheme, it is clear that "[t]he statute carefully distinguishes between the circumstances that define complete withdrawal and those which give rise to a cause of action." *Joyce v. Clyde Sandoz Masonry, supra*, 871 F.2d at 1123. The function of delineating the date of complete withdrawal is simply "to demarcate or to allow calculation of the employer's share, if any, of the plan's unfunded vested liability." *Id.* No "cause of action" "arises" on the date that complete withdrawal occurs because no employer payment obligation of any kind, capable of being breached, exists until well after that date.[8]

Instead, as the D.C. Circuit went on to explain in *Joyce*:

> The statute itself . . . indicates that the plan is "adversely affected" (and thus that a "cause of action" arises) when the plan has not received payments which are due and owing. The language of the statute (including the terms of section 1451 itself) points firmly in the direction of the conclusion that [the employer's] uncured failure to pay the sum demanded adversely affect[s] the plan, thus giving rise to a cause of action. *See* 29 U.S.C. §§ 1399(c)(5), 1401(b). . . . Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action. [871 F.2d at 1122-23, footnotes and citations omitted.]

In short, the Court of Appeals' analysis in this case fails because, unlike the D.C. Circuit's reasoning in *Joyce*, the Ninth Circuit ignored critical statutory language permitting plans to bring suit for withdrawal liability only *after* payments are "due and owing."

[8] Indeed, on the date of complete withdrawal, neither the plan sponsor nor the employer knows the amount of withdrawal liability or even whether the employer will owe anything. *See* § 1391(b)(1) (employer's proportional share of the plan's unfunded vested benefits may be "zero.")

B. This statutory language and structure analysis is more than sufficient to demonstrate why the D.C. Circuit was right and the Ninth Circuit wrong on the question here presented. Additionally, the D.C. Circuit's application of § 1451 in *Joyce* yields a result that accounts for the pertinent practical considerations, while the Ninth Circuit's statute of limitations theory is based on practical concerns that are fully met by statutory provisions quite separate from the limitations section.

On the one hand, the *Joyce* approach takes account, as the Ninth Circuit interpretation does not, of the fact that it is sometimes impossible to determine whether a complete withdrawal has occurred until years after the fact, as in cases of plant shutdowns or bargaining impasse. "This determination cannot necessarily be made upon complete withdrawal; rather it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123.

In the building and construction industry, the uncertainty is exacerbated. The MPPAA provides that complete withdrawal occurs on the date such an employer "ceases to have an obligation to contribute under the plan," but only if the employer "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." § 1383(b)(2)(B)(ii). As a result,

> the plan sponsor (or any other party) may not be able to establish that the building or construction industry employer has completely withdrawn until as much as five years after what the parties eventually determine to have been the date of complete withdrawal. To conclude that an event requiring such a post hoc (and belated) determination triggers the limitations bar would create, at the least, an unwieldy statutory collection mechanism. [*Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123-24.][9]

On the other hand, while the Ninth Circuit thought that its construction of § 1451 was necessary to assure that pension plan trustees promptly assess and collect withdrawal liability (App. 27a), MPPAA provisions entirely apart from the running of the statute of limitations provide powerful incentives for plan sponsors to expedite the process of assessing withdrawal liability.

Section 1399(b)(1) requires the plan sponsor to assess, schedule and demand withdrawal liability payment "[a]s soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). An employer may defend in arbitration against paying withdrawal liability on the ground that the plan sponsor failed to satisfy the "as soon as practicable" requirement. *Giroux Bros. Transportation, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d at 2, 4; *see Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1126-27. Thus, a

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[9] The Ninth Circuit purported to avoid this problem in *Thibodo* by holding that the statute of limitations runs not from the date defined by the statute as the "date of complete withdrawal"—namely, the "date of the cessation of the obligation to contribute or the cessation of covered operations" (§ 1383(e))—but, instead, from "the date on which the conditions for complete withdrawal . . . have been met"—that is, in the case of a construction industry employer who returns to the jurisdiction within five years, the date of that return. 34 F.3d at 917. In this case, however, the Ninth Circuit lost sight of that distinction, and instead construed and applied *Thibodo* as holding that "[i]n other words, the limitations period begins to run from the date of complete withdrawal." App. 4a.

If anything, *Thibodo* adds to the disarray in the courts of appeals in determining when a cause of action arises within the meaning of § 1451(f)(1), by suggesting that sometimes a cause of action arises after the date on which complete withdrawal is deemed to occur under the statute but still before the plan has assessed withdrawal liability, set a payment schedule, or made any demand for payment.

plan that is dilatory in assessing the withdrawal liability and demanding payment risks losing the right to collect the amount due.

Moreover, "[t]he plan sponsor that unduly delays in taking appropriate action . . . may invite a claim for breach of fiduciary duty." *Joyce*, 871 F.2d at 1126. Putting off the assessment and collection of withdrawal liability causes the plan to lose the investment value of money due to it, and may threaten the solvency of the fund.[10] Plan beneficiaries therefore could sue procrastinating trustees under ERISA, seeking to recover for the fund the earnings the withdrawal funds could have generated for the beneficiaries had those funds been timely assessed, collected and invested. *See* §§ 1145, 1399(c)(3), 1401(d), 1451(d).

Because other provisions of ERISA adequately assure timely assessment of and demand for withdrawal liability, there is no reason to contort the provisions governing the statutory limitations period on filing collection lawsuits, as the Ninth Circuit did here, in order to serve ends for which those provisions were not intended.

2. While disagreeing uniformly with the Ninth Circuit's erroneous interpretation of § 1451(f)(1), other circuits have adopted at least two other inconsistent and incompatible interpretations of that provision:

The Seventh Circuit holds that once there is the requisite demand for payment of withdrawal liability and the employer fails to make a single installment payment under the schedule set out by the plan sponsor, the limitations period *on the entire withdrawal liability* begins to run. According to the Seventh Circuit, unless the plan sues for

[10] The amount of the amortization interest built into the payment schedule is fixed by the statute no matter when collection actually occurs. *Schlitz*, 115 S.Ct. at 990. Consequently, if the plan trustees do not promptly assess withdrawal liability, the plan will not collect interest for the period of the delay.

the entire amount within the statutory limitations period as figured from the first missed payment, it loses the right to sue for *any* of the installments due later. *Central States Pension Fund v. Navco, supra*, 3 F.3d at 172.

The Third Circuit, in *Dist. 15, Machinists Pension Fund v. Kahle Engineering Corp., supra*, expressly rejected the *Navco* approach as "unpersuasive." 43 F.3d at 858. *Kahle* holds instead that, unless the plan chooses to accelerate the entire debt after a missed payment under § 1399(c)(5), as it "may" do, the limitations period runs from each missed installment payment, with respect to collection of that payment.[11]

On the facts of this case, the difference between the Third and Seventh Circuit positions is determinative. The collection suit in this case was filed more than six years (by eight days) after the first missed payment was due, but less than six years after every other installment payment (as well as the alternative, lump sum payment) was due, and less than six years before the plan *could* have insisted on accelerating payment of the entire debt under the statute had it wished to.[12] Under the Seventh Cir-

[11] Neither the D.C. Circuit in *Clyde Sandoz Masonry* nor the First Circuit in *Giroux* squarely addressed the question on which the *Navco* and *Kahle Engineering* opinions are in conflict. The reasoning of *Clyde Sandoz Masonry*, however, favors the *Kahle Engineering* approach. 871 F.2d at 1124 (the cause of action arises "based on the adverse effect on the plan of failure to receive demanded payment," and the plan may, but need not, make demand for "the entire amount of withdrawal liability," but only *after* default on a payment); *see Kahle Engineering*, 43 F.3d at 860 (reading *Clyde Sandoz Masonry* as supporting the *Kahle Engineering* interpretation).

[12] Under the statute and implementing regulations, the plan may not accelerate the payment schedule and demand payment in full during the period allowed for appeals and arbitration challenging the liability assessed. § 1451(a)(1); *Kahle Engineering Corp.*, 43 F.3d at 855 ("[i]f an employer misses a scheduled [interim] payment, the fund may seek to collect by filing a collection action

cuit's *Navco* interpretation of the statute, the suit is barred (as the District Court in this case alternatively held); under the Third Circuit's *Kahle Engineering* analysis, the only possible impact of § 1451(f)(1) would be to bar collection of the first unpaid installment payment.

The *Kahle Engineering* analysis is faithful to the statutory scheme, as a whole, while that of the Seventh Circuit in *Navco* is not.

The premise of the *Navco* holding is that "[a]lthough a fund *may* permit an employer to amortize [withdrawal liability] over twenty years . . . the whole amount is presumptively due at the outset." 3 F.3d at 172 (emphasis supplied). That premise is simply wrong.

As this Court made clear in *Schlitz*, the statute itself establishes the installment payment option for employers, the amount of each annual payment, and the number of such annual payments that may be required. 115 S.Ct. at 986; § 1399(c)(1). Under the statute, the *only* statutory obligation of the employer at the time of the first missed payment was to pay that installment. The plan therefore *could not* sue at that juncture, even if it wished to, for more than that single payment. *See* §§ 1399(c)(1)(A), (2), and (4) (obligation is to pay according to the installment schedule); 1451(b) (in an action to compel payment of withdrawal liability, "any failure of the employer to make any withdrawal liability payment shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).")

It is true, of course, that the MPPAA allows, *but does not require*, a plan sponsor faced with the default of a withdrawing employer on one or more scheduled pay-

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but it may not accelerate the balance during that protected arbitration period.") *See also Trustees of the Plumbers and Pipefitters National Pension Fund v. Mar-Len, Inc.*, 30 F.3d 621, 624 (5th Cir. 1994).

ments to accelerate the employer's obligation to pay the full amount of withdrawal liability.[13] Such default and acceleration "provide[] the predicate for a plan sponsor's suit" for the full amount of withdrawal liability (*Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123), but only if the plan sponsor *elects* to accelerate.[14]

By insisting that "the whole sum becomes due and the whole claim accrues when the first payment is missed" *Navco* "in effect imposes a compulsory acceleration clause," although the statute in terms provides a discretionary one, and one that can be invoked necessarily only after the first payment is due under the plan's demand. *Kahle Engineering*, 43 F.3d at 859. The *Navco* holding is therefore at odds with the statute's plain language.

The *Kahle Engineering* analysis, in contrast, gives effect to both the obligation to permit installment payments

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[13] Section 1399(c)(5) provides:

> In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability of the employer from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—
>
> (A) the failure of the employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

[14] The analysis in the text is intentionally simplified to apply to *any* missed payment. We reiterate, however, that at the outset of the payment schedule the Seventh Circuit's interpretation is particularly untenable, since the option the plan otherwise has to accelerate the entire debt if it wishes to and demand payment of all of the withdrawal liability does not come into existence until after the period for demanding arbitration has passed—which it had not as of February 1, 1987 in this case. *See* n.12, *supra*.

and the optional nature of debt acceleration when one of the payments is missed. As the Third Circuit explained:

> the employer's obligation to make the scheduled payments is akin to the obligation to make installment payments. In an installment payment contract, a new cause of action arises from the date each payment is missed. [43 F.3d at 857].

See also Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc., 948 F.2d 1219, 1223 (11th Cir. 1991) ("with respect to each withdrawal liability installment, the right to sue [under 29 U.S.C. § 1451] is triggered by the failure to pay the installment within the prescribed time," *i.e.*, at the due date of each installment).[15]

The *Kahle* interpretation is not only more consistent with the statutory language and structure but also avoids "perverse incentives" that the *Navco* rule creates. *Kahle Engineering*, 43 F.3d at 859. Maintaining the flexibility of the plan *not* to accelerate the debt when a payment is missed "[en]courages amicable resolution of disputes and . . . reentry into the fund as a contributing employer." *Id.* To force acceleration of the debt when the first missed payment occurs would preclude an accommodating fund from suing on any payment missed more than six years after the first, and could require a plan to sue for the

[15] As *Kahle* went on to note, where there is an installment sales contract, the statute of limitations begins to run separately against each installment when that installment becomes due, whether or not the debtor has the option to pay the entire indebtedness at any time and whether or not the creditor has "'the right upon certain contingencies to declare the whole sum due . . . unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option.'" *Kahle Engineering*, 43 F.3d at 857, *quoting* 51 Am.Jur.2d: Limitations of Actions § 133; *see Carriers Container Council, Inc. v. Mobile S.S. Ass'n., Inc.*, 948 F.2d at 1222-24.

This Court in *Schlitz* confirmed that the method of paying withdrawal liability under the statute is akin to contractual installment payments. 115 S.Ct. at 988.

entire amount rather than for the past overdue payments alone even where doing so would make the employer insolvent (and therefore unable to make the later payments as they become due). Insisting upon draconian enforcement of the obligation to pay withdrawal liability does not benefit any of the potentially affected parties—the employer, the plan, or the plan beneficiaries.

CONCLUSION

The question presented here—when a cause of action for an employer's failure to fulfill its withdrawal liability obligation arises—affects employers, pension plans, and employees throughout the nation. The Courts of Appeals are in disarray on these issues, taking several inconsistent and incompatible positions. This case is well-suited for a definitive decision by this Court, because the facts of the case raise every one of the various interpretive permutations adopted by the courts of appeals. This Court should therefore grant this petition for writ of certiorari to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 94-15976

BAY AREA LAUNDRY & DRY CLEANING PENSION TRUST FUND,
Plaintiff-Appellant,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., a California Corporation; FERREIRA FARMS, INC., a California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California

Argued and Submitted Nov. 16, 1995
Decided Jan. 17, 1996

Before: NORRIS, BEEZER, and TROTT, Circuit Judges.

PER CURIAM:

This case arises from an action filed on February 9, 1993, by the Bay Area Laundry and Dry Cleaning Pension Trust Fund against Ferbar Corp. and Stephen J. Barnes ("Ferbar") to collect withdrawal liability under 29 U.S.C. §§ 1381-1461, the Multi-Employer Pension

Plan Amendments Act of the Employee Retirement Income Security Act. The district court granted summary judgment for Ferbar on the ground that the Fund's suit for withdrawal liability was barred by the applicable statute of limitations set forth in 29 U.S.C. § 1451(f). This statute provides in relevant part:

> § 1451. Civil Actions . . .
>
> (f) Time limitations. An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; . . . .

29 U.S.C. § 1451(f). The district court applied the three-year statute of limitations set forth in § 1451(f)(2), but in the alternative held that the action would nevertheless be barred under the six-year statute of limitations set forth in § 1451(f)(1), reasoning that the cause of action arose on the date that Ferbar missed its first withdrawal liability installment payment. On appeal the parties contest, first, whether the three-year or the six-year period applies, and second, the date on which the limitations period began to run.

I

BACKGROUND

In March, 1985, Ferbar effected a complete withdrawal from the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. The notice provided that Ferbar could pay off its withdrawal liability in one of two ways: (1) it could either make a single lump-sum payment of the total liability no later than 60 days after receipt of the demand, or (2) it could begin making installment pay-

-ments according to a schedule established by the Fund, with the first payment due on February 1, 1987. Ferbar did not pay the first installment, but rather on February 27, 1987, exercised its right to request review of the assessment by the Board of Trustees. On April 14, 1987, the Fund notified Ferbar that Ferbar's first payment was delinquent, and informed Ferbar that it had 60 days from the notice to cure the delinquency, or it would be considered in default. Ferbar did not cure its delinquency.

II

APPLICABLE LIMITATIONS PERIOD

The district court held that the Fund's action was time-barred because it was filed more than three years after the Fund acquired knowledge of the cause of action, citing § 1451(f)(2). The Fund argues that the action could not be time-barred until six years after the cause of action arose.

We agree with the Fund. The district court misread the plain language of § 1451(f), which clearly directs courts to apply "the later of" the two periods of limitations. On the facts of this case, "the later of" the two periods is six years from the date the cause of action arose. We now turn to the question when the cause of action arose.

III

WHEN THE CAUSE OF ACTION AROSE

In its alternative holding, the district court determined that the cause of action arose on February 1, 1987, the date on which Ferbar missed its first installment payment for the assessed withdrawal liability. The Fund argues that the cause of action arose on June 14, 1987, the date of default.[1] Ferbar argues that the cause of action arose

[1] Default occurs when the employer has received notice that it has missed a payment and has failed to cure the delinquency within 60 days. *See* 29 U.S.C. § 1399(c)(5) (defining "default").

in March, 1985, the date of complete withdrawal, or alternatively on the date of the first missed payment.

Our court has recently spoken dispositively on this issue. In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir.1994), we held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-17. In other words, the limitations period begins to run from the date of complete withdrawal—in this case, March 1985.

It is true that *Thibodo* by its terms applies only to actions arising under 29 U.S.C. § 1383(b), which defines the conditions for complete withdrawal only in the building and construction industry.[2] The conditions for complete withdrawal in most other industries are defined by

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[2] § 1383(b) provides:

§ 1383. Complete Withdrawal . . .

(b) Building and construction industry.

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry . . .

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

29 U.S.C. § 1383(b).

§ 1383(a), which governs the present action.[3] However, we see no basis for distinguishing an action brought under § 1383(a) from one brought under § 1383(b) for the purpose of applying the statute of limitations set forth in § 1451(f). Indeed, the Fund makes no attempt to distinguish *Thibodo* from the present action for statute of limitations purposes. Accordingly, we hold that *Thibodo* controls actions arising under § 1383(a) as well as actions arising under § 1383(b).

Under *Thibodo*, the period of limitations began running in March, 1985, when Ferbar effected a complete withdrawal from the Fund.[4] Because the Fund filed the present action on February 9, 1993, more than six years later, we AFFIRM the summary judgment for Ferbar on the ground that the action is time-barred.

TROTT, Circuit Judge, concurring.

I concur in Judge Norris's opinion because I believe *Thibodo* compels this result. I believe, however, that *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.) does a better job of answering the questions raised by these issues, but we do not have authority to ignore our own decisions.

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[3] § 1383(a) provides:

(a) Determinative factors.

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1383(a).

[4] Ferbar never agreed to the installment plan proposed by the Fund and made no installment payments. As a result, it appears that no new contract to pay off the withdrawal liability could have been formed. *See* 1A Arthur L. Corbin, *Corbin on Contracts* § 211 (1963). Had such a contract been formed, the Fund might have a separate claim, with its own statute of limitations, for breach of that contract.

APPENDIX B

[Filed May 9, 1994]

No. C-93-0489 DLJ

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Plaintiffs,

v.

FERBAR CORP., FERREIRA FARMS, INC., DIABLO CLEANERS, INC., STEPHEN BARNES and ROBERT FERREIRA,
Defendants.

ORDER

Following oral argument and the submission of supplemental briefing on December 22, 1993, the parties' cross-motions for summary judgment in this matter were before the Court. Geoffrey White represented plaintiffs; defendants Ferbar Corporation and Stephen Barnes were represented by William Terheyden of Littler, Mendelson, Fastiff, Tichy & Mathiason. Having considered the papers submitted and the applicable law, the Court now finds the applicable statute of limitations has lapsed, and grants summary judgment in favor of defendants Ferbar and Barnes.

BACKGROUND

I. *Factual Background and Procedural History*

Plaintiffs bring this action under 29 U.S.C. §§ 1381-1461, ERISA's Multi-Employer Pension Plan Amendments Act. It is defendants' position that they were not obligated under a collective bargaining agreement to contribute to an employee trust fund. For purposes of this

summary adjudication, however, defendants acknowledge making contributions for several years to a Fund for the benefit of three business locations—Superior French Laundry, One Hour Martinizing and Diablo Cleaners. These contributions were discontinued to Diablo Cleaners in February of 1983, at which time Ferbar no longer owned Diablo Cleaners. Defendants' Mot. for Sum. J. at 2.

In March of 1985, Ferbar ceased altogether to make contributions to the remaining locations, following submission of a petition by a majority of the employees working at Superior French Laundry and One Hour Martinizing which indicated they no longer wanted union representation. Plaintiffs' Opp'n Mot. at 2; Defendants' Mot. for Sum. J. at 2.

On December 12, 1986, plaintiffs sent a notice to Superior French Laundry, asserting a withdrawal liability obligation of $45,580.80. Plaintiffs' Opp'n Mot. at 2. That notice provided that Superior French would be able to satisfy this debt in one of two ways: Superior French could (1) make a single lump-sum payment of the total withdrawal liability no later than sixty days after the demand; or (2) begin making installment payments of withdrawal liability pursuant to a schedule set forth by the Trust Fund, with the first monthly payment due on February 1, 1987. Plaintiffs' Opp'n Mot. at 2.

Defendants since then have made no payments on the withdrawal liability. On February 27, 1987, Ferbar requested a review of the plaintiffs' assessment. Plaintiffs' Opp'n Mot. at 2. By letter dated April 14, 1987, the Fund notified Ferbar it was delinquent, and that Ferbar had sixty days from the date of notice to cure the delinquency, or it would be considered in default. *Id.* Plaintiffs filed this lawsuit on February 9, 1993.

II. *Legal Standard*

The Federal Rules of Civil Procedure provide for summary adjudication where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, '*specific facts* showing that there is a genuine issue for trial.'" *T.W. Electric Service, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2553 (1983)).

In contrast to a plaintiff's motion for summary judgment, a defendant's motion for summary judgment faces a lighter burden. Because the defendant does not bear the burden of proof at trial, the defendant need only point to the insufficiency of the plaintiff's evidence to shift the burden to the plaintiff to raise genuine issues of fact as to each claim by substantial evidence. *T.W. Electric* at 630, *citing Celotex* at 2553. If plaintiff fails to raise a genuine issue of fact, then summary adjudication in favor of the defendant will be granted.

DISCUSSION

The Court's decision in this matter depends on an interpretation of 29 U.S.C. § 1451, that portion of the Multi-Employer Pension Plan Amendment Act defining the relevant statute of limitations. That section provides:

> (f) An action under this section may not be brought after the later of—

> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

A. *The Applicability of 29 U.S.C. § 1451(f)(2)'s Three-Year Statute of Limitations*

Defendants argue that the shorter of the two statutes of limitations applies—and acts as a bar—to the present action. This shorter, three year statute of limitations, *see* § 1451(f)(2), applies to instances in which the plaintiff has actual or constructive knowledge of the accrual of a cause of action. Notwithstanding the scarcity of case law invoking § 1451(f)(2) with respect to cases involving withdrawal liability, it is the conclusion of the Court that this section applies in the present instance.

It is a canon of statutory construction that, where possible, a statute be interpreted to give effect to all its component parts. *Reiter v. Sonotone Corp.*, 99 S. Ct. 2326, 2331 (1979). To give such meaning to § 1451(f), a three-year statute is interposed in those instances where a plaintiff does or should know of the existence of a cause of action, except in instances of fraud or concealment.

The immediate problem with plaintiffs' attempt to apply a six year statute to all aspects of the present action is reflected in their assertion that the six year statute is triggered only after their knowledge of defendants' default. Specifically, plaintiffs argue that the statute cannot be found to run until defendants failed to make payment following sixty days after they received notice of the delinquency. Plaintiffs' Opp'n at 8. On its face, this argument twists the very premises of § 1451(f) by combining

the six year provision of § 1451(f)(1) with the knowledge component of § 1451(f)(2). The argument is, accordingly, flawed since the six year statute cannot correspond to instances in which such knowledge is conceded.

Plaintiffs attempt variously to justify their assertion of the inapplicability of the three year statute of limitations to the present case. Initially, plaintiffs argue § 1451(f)(2) can be given effect since the section applies to other cases not involving withdrawal liability. Such application, according to plaintiffs, proves that the three year statute is not rendered meaningless since it would continue to apply to other causes of action under Subtitle E of Title IV of ERISA, *e.g.* reorganizations, mergers, transfers of assets, insolvency and termination. *See* Plaintiffs' Sup. Mot. at 10-11; *see also Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1125 (D.C. Cir.), *cert. denied*, 110 S. Ct. 280 (1989). "The fact that one prong of the general statute of limitations contained at 29 U.S.C. § 1451(f) may not have applicability to one particular provision in the subtitle does not mean that it is surplusage with respect to all other provisions." *Id.*

Plaintiffs further argue that "the 'discovery' prong of the limitations period can also apply directly to some aspects of collection of withdrawal liability." Plaintiffs' Sup. Mot. at 11. For example, plaintiffs argue that § 1451(f)(2) is given effect in instances where an employer's inability to make further payments of withdrawal liability constitutes a default under Plan regulations allowing acceleration of withdrawal liability. *Id.; see also Joyce*, 871 F.2d at 1125.

These arguments are unavailing, for the reason that plaintiffs have elicited no statutory or case law, nor any indicia of Congressional intent, supporting such a reading. While plaintiffs have presented the Court with scenarios in which the three year statute might alternatively be applied, and therefore given meaning, plaintiffs have neglected to proffer any sufficient reasons why § 1451(f)(2) should

be so limited. In the absence of such support, the Court must assume that Congress meant what it said in deeming the three year statute in § 1451(f)(2) applicable to all of Subtitle E of Title IV of ERISA. *See* § 1451(a)(1).

The three year statute of § 1451(f)(2) thus applies to the present action. As plaintiffs knew a cause of action existed no later than 1987, *see* Defendants' Sup. Mot. at 4 n.1, 5, yet filed their complaint in excess of three years of that time, the present action is barred by the applicable statute of limitations.

B. *Even Were the Six Year Statute of Limitations Deemed Applicable, the Present Case Would Still be Barred Since the Statute Begins Running at the Date of the First Omitted Payment*

Applying the six year statute of limitations urged by plaintiffs would not, in any event, affect the Court's conclusion that the present action is statutorily time-barred. In making the argument, whether primarily or alternatively, that the six year statute applies, the point of dispute among the parties centers upon the date the statue is deemed triggered. Defendants argue the statute begins to run from the moment an employer withdraws from a fund; plaintiffs argue the statute begins to run once an employer misses on contribution payments and then fails to cure that failure following receipt of notice of default.

It is the conclusion of this Court that the answer falls between these two suggestions. Although the Ninth Circuit has not answered the question, the running of the six-year statute is appropriately found to begin at the date that an employer first fails to make a payment pursuant to the governing schedule.

This outcome follows a sensible application of the statute, and the direction of applicable case law. Title 29 U.S.C. § 1399(c)(2) provides:

> Withdrawal liability shall be payable in accordance with the schedule set forth by the plan's sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

Here, plaintiffs had set forth a schedule under which payment was due, at the latest, February 1, 1987. Though defendants failed to meet that schedule, plaintiffs argue such non-payment alone cannot give rise to a cause of action, since the non-payment could subsequently have been cured.[1] It is the opinion of the Court, however, that there has been sufficient adverse action at the very moment a payment becomes overdue to trigger the statute of limitations.

The applicable PBGC regulations distinguish between the term "overdue" and the term "default." Title 29 C.F.R. § 2644.2(a) provides that withdrawal liability is "overdue" if unpaid at the date set forth in the applicable schedule. "Default," by contrast, is defined as occurring sixty days after the employer receives written notification from the plan's sponsor that the payment is overdue. *See* 29 C.F.R. § 2544.2(b)(i). It is when a payment is overdue, and not in default, that a cognizable injury occurs which triggers the statute of limitations.

The facts of the present case well illustrate that, upon the first payment becoming overdue, there was adverse action. In their December 12, 1986 letter to defendants, plaintiffs wrote that defendants would be incurring inter-

[1] Plaintiffs also argue that "the Plan must allow a *minimum* of sixty days after the date of the demand for the employer to commence making installment payments of withdrawal liability under 29 U.S.C. § 1399(c)(2)." Plaintiffs' Sup. Mot. at 4-5. Plaintiffs concede the absence of any supporting case law for this position. Further, § 1399 merely provides that "[w]ithdrawal liability shall be payable . . . *no later than* 60 days after the date of demand. . . ." 29 U.S.C. § 1399(c)(2) (emphasis added).

est charges if they failed to timely make the first monthly payment. *See* Defendants' Sup. Mot. at 8-9. Further, the letter stated that defendants might "incur liability for liquidated damages and other sums assessed in other delinquency provisions of the Plan's Trust agreement; and your obligation may be subject to such additional steps as the Trustees may require in accordance with the law." *Id.* at 9; Barnes Decl. at Exh. A. Thus, plaintiffs were adversely affected when the first monthly payment was not made by the February 1 date. At that time, then, plaintiffs' cause of action arose and, concomitantly, the statute of limitations began running.

This holding is in accord with the holdings of those decisions involving the issue in question. In *Joyce, supra,* the District of Columbia Circuit held that a cause of action arose not on the date of the employer's withdrawal from a fund, but from the time a plan demanded payment and the employer refused to comply with the demand.

> When, and only when, the employer fails to meet that demanded schedule of payments (and fails to cure that failure) has the plan been harmed (and thus becomes entitled to maintain its claim against the employer).

871 F.2d at 1124. *See also ILGWU National Retirement Fund v. Smart Modes of Calif., Inc.*, 735 F. Supp. 103 (S.D.N.Y. 1990) (characterizing *Joyce* as a "well-reasoned and thorough opinion"). Similarly, in *Chicago Truck Drivers Pension Fund v. Van Vorst Indus.*, 800 F. Supp. 587 (N.D. Ill. 1992), *aff'd, Central States, Southeast & Southwest Areas Pension Fund v. Navco,* 3 F.3d 167 (7th Cir. 1993), the court concluded that the claim accrued at the time the first payment was due. Numerous unpublished opinions are also in accord. *See Debreceni v. Westfair Transport Corp.*, 1988 U.S. Dist. LEXIS 9527 (D. Mass. 1988); *Central States, Southeast & Southwest Areas*

Pension Fund v. Cherry Branch Properties, 1991 U.S. Dist. LEXIS 14350 (N.D. Ill. 1991).[2]

Plaintiffs argue the accrual of a cause of action cannot be designated as the date of the first missed payment, since such a decision would "create serious impediments . . . because of minor delinquencies during the administrative process." Plaintiffs' Sup. Mot. at 8. Plaintiffs pose the specter of an employer who misses his first installment payment, then timely pays installments for the next six years, and thereafter stops all further payments. *See id.* Plaintiffs argue that if the first missed payment triggers the statute of limitations, then the fund would be barred from attempting to collect the succeeding, owed payments. This concern is unfounded, however. While the first, missed payment in the hypothetical would be time-barred, a new cause of action would have arisen from the time the payments were stopped.

The parties suggest the Court adopt other alternatives in determining the appropriate trigger for withdrawal liability. The breadth of these proffered solutions stems largely from a dictum in a Ninth Circuit opinion, which inaccurately depicts the degree of difference among courts addressing the very question now considered. In *Brentwood Financial v. Teamsters Pension Trust Fund*, 902 F.2d 1456 (9th Cir. 1990) (declining to adopt a theory when the statute of limitations was triggered for withdrawal liability actions), the Court wrote:

> Although this court has not considered the question of when the six-year statute of limitations begins to run, other courts have addressed and split on this issue. The Seventh Circuit concluded that the limitations period begins to run when a 'complete withdrawal' occurs. *See Trustees of Ironworkers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir.), *cert. denied*, 110 S.Ct. 143 (1989). The District of Columbia Circuit held, however, that the limitation period begins to run from the time the employer first fails to make the withdrawal payment demanded by the Plan. *See Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1122 (D.C.Cir.), *cert. denied*, 110 S. Ct. 280 (1989).

[2] Few decisions appear to hold to the contrary. *But see, e.g., Connors v. Peles*, 724 F. Supp. 1538, 1578-79 (W.D. Pa. 1989) (finding, without analysis, that "Plaintiffs' cause of action accrued on . . . the date at which [defendant] no longer became obligated to contribute to the Pension Fund.").

Defendants wield this language in arguing that the statute of limitations began running when defendants withdrew from the Fund. Plaintiffs, however, argue correctly that the Ninth Circuit wrongly framed the issue by inaccurately citing a Seventh Circuit case for the proposition that the limitations period begins to run when a "complete withdrawal" occurs. Plaintiffs' Opp'n Mot. at 7. That referenced opinion, *Iron Workers, supra*, does not once cite section 1451(f) or contain any discussion of a statute of limitations; instead, the opinion examines an employer's date of withdrawal from a fund only in order to ascertain the amount of withdrawal liability incurred. *Cf. Cherry Branch Properties, supra*, 1991 U.S. Dist. LEXIS 14350 (unpublished) ("*Ironworkers* . . . does not confront the issue. . . . Thus we find the Ninth Circuit's recent discussion of the two cases unenlightening [since] its recitation of the Seventh Circuit's conclusion . . . is flatly wrong."). Other than the unelaborated assertion "that how the Ninth Circuit reads *Ironworkers Local 473 Pension Trust* controls the parties in the instant case", Reply at 2, defendants do not defend the accuracy of the Ninth Circuit's characterization of *Iron Workers*.

Apart from the lack of supporting case law, it is clear that the date of withdrawal would be an inappropriate point at which to begin the running of the statute of limitations for withdrawal liability cases. Defendants argue that "[if] the statute of limitations is not deemed to run

from the time of withdrawal. . ., there is no incentive for a trust fund to make its calculations and attempt to obtain payment. It could take as long as it wants to impose the liability if the period of limitations does not begin to run until the imposition is made and the payment not made . . . and a company that withdrew may be hit with withdrawal liability many years after withdrawal and after relying on the fact that it owed no withdrawal liability as it never heard from the trust fund." Defendants' Sup. Mot. at 6.

This argument is unpersuasive. Most important, defendants have failed to cite any evidence that Congress actually intended that the statute of limitations would be triggered at the moment of withdrawal. Further, defendants' recitation of the evil effects which would ensue from setting the trigger date after the time of withdrawal is suspect, as there is *not* an incentive for a trustee to postpone making a claim of withdrawal liability. To the contrary, it is a trustee's statutory duty to timely protect the interests of the Plan. *See* § 1399(b)(1) (providing that a fund, [a]s soon as practicable after an employer's complete . . . withdrawal" (1) calculate the employer's withdrawal liability, (2) set forth a schedule of payments, and (3) demand that the employer make payments pursuant to that schedule). Moreover, there is obvious risk involved in the event a trustee delays collection, and necessary cost incurred by collecting later rather than sooner. Finally, to the extent an employer is concerned about determining the existence or extent of future withdrawal liability, then that employer may at his own behest make such inquiry at the onset of his withdrawal. Defendants' concerns are thus unfounded that, if the statute is not triggered at the moment of withdrawal, a trustee will delay collection of payment in order to extend the statute of limitations.

Plaintiffs' argument as to when the statute of limitations should be deemed triggered is similarly unpersuasive. Plaintiffs suggest that failure to make the payment triggers

liability only with respect to interest charges, but that no default can occur until an employer fails to make payment and, after receiving notice of the delinquency, fails to cure that delinquency within a specified period of time. Plaintiffs' Opp'n at 8. As applied to the present case, plaintiffs argue that a cause of action by a fund to collect withdrawal liability does not begin until (1) the fund has assessed liability against the employer; (2) the employer has failed to make a payment due on the schedule; and (3) the employer has failed to cure its delinquency within 60 days *after notice* by the fund. *Id.* Under this theory, since plaintiffs did not give notice to defendant of its delinquency until a letter dated April 14, 1987, defendants still had 60 days from that date to cure their failure to pay, thereby placing the expiration date of the statute of limitations on June 14 1993. Plaintiffs' Opp'n at 1.

Plaintiffs argue that "the text of the Assessment plainly states, even though the monthly payments are to begin on February 1, failure to make the payment triggers liability for interest charges, but no 'default' can occur until the Defendants fail to make payment following 60 days after receiving notice of the delinquency." Plaintiffs' Opp'n at 8.

Plaintiffs' interpretation is unavailing for various reasons. First, it is unsupported by case law. Plaintiffs latch on to language in *Joyce* that "[the] *uncured* failure to pay the sum demanded [gives] rise to the cause of action." 871 F.2d at 1122 (emphasis added). There, however, the District of Columbia Circuit continued that "the plan sponsor's demand for payment triggers the employer's obligation to pay, and the employer's failure to make the scheduled payment in turn provides the predicate for a plan sponsor's suit. That is to say, the failure to pay gives rise to a cause of action." *Id.* at 1122-23. Most significantly, the holding of that case does not postpone the trigger for the statute of limitations in the manner sought by plaintiffs.

Similarly, *Navco*, *supra*, is also unsupportive of plaintiffs' position. Plaintiffs cite the language of *Navco* that "[a]s soon as the 60-day grace period provided by § 1399(c)(2) expired, the funds could have commenced suit. They had been injured. That is the standard definition of the 'accrual' of a claim." 3 F.3d at 171. The Court continued, however, that "the claim accrues as soon as payment becomes overdue." *Id.* at 172. Moreover, there, too, the court did not in its holding expressly postpone the triggering of the statute of limitations.

No case has been cited to the Court in which a court held the staute of limitations of § 1451(f) was tolled until after default and subsequent expiration of a designated time period. This absence is understandable, since the predictability sought by implementation of a statute of limitation would be undercut by such an interpretation. Allowing the grace period suggested would enable an injured fund to toll a statute of limitations by virtue of having neglected to formally notify an employer of a forthcoming default, though an owing payment was already overdue. The absence of case law supporting plaintiffs' position is also understandable since, whether set at three or six years, the governing statute of limitations is a lengthy one, for which resort to extenuating methods of tolling has proved seldom necessary.

In conclusion, then, even were the six year statute to apply, the present action would be barred. Defendants were obligated—and failed—to make the first required withdrawal liability payment on February 1, 1987, a date preceding the filing of the lawsuit by more than six years. *See* Defendants' Mot. for Sum. J. at 7; Plaintiffs' Opp'n at 8. Accordingly, the present action is time-barred, and summary judgment is appropriately granted in favor of defendant Ferbar Corporation and defendant Stephen Barnes.

CONCLUSION

For the foregoing reasons, the Court Orders as follows: The motion for summary judgment submitted on behalf

of defendants Ferbar Corporation and Stephen Barnes is GRANTED. Partial judgment shall be entered accordingly. A status conference shall occur among the remaining parties to this action on May 25, 1994 at 8:30 a.m.; all other dates currently scheduled are hereby vacated.

IT IS SO ORDERED.

Dated: May 9, 1994.

/s/ D. Lowell Jensen
D. LOWELL JENSEN
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

[Filed May 13, 1996]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-15976
D.C. No. CV-93-00489-DLJ

BAY AREA LAUNDRY & DRY CLEANING PENSION TRUST FUND,
Plaintiff-Appellant,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., a California Corporation; FERREIRA FARMS, INC., a California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA
Defendants-Appellees.

ORDER

Before: NORRIS, BEEZER, and TROTT, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing. Judges Beezer and Trott have voted to reject the suggestion for a rehearing en banc, and Judge Norris has recommended the same.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

APPENDIX D

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 93-55079, 93-55080

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Plaintiff-Appellant,

v.

RUSSELL L. THIBODO; GARY R. THIBODO; THIBODO CONSTRUCTION CO. INC.; DRAINAGE CONSTRUCTION CO.,
Defendants-Appellees.

BOARD OF TRUSTEES OF THE CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,
Plaintiff-Appellant-Appellee,

v.

RUSSELL L. THIBODO; THIBODO CONSTRUCTION CO. INC.,
Defendants-Appellees-Appellants.

Appeals from the United States District Court
for the Central District of California

Argued and Submitted June 8, 1994

Decided Sept. 12, 1994

Before: FLETCHER, CANBY and HALL, Circuit Judges.

CANBY, Circuit Judge:

The Board of Trustees of the Construction Laborers' Pension Trust for Southern California appeals the district

court's dismissal of this action in which the Trustees sought to enforce an arbitration award. The arbitrator had determined that Russell Thibodo was personally liable to the Trust for ERISA withdrawal liability incurred as a result of his construction company's complete withdrawal from the Construction Laborers Pension Plan in 1983. The district court, however, held that the Trustees' action was barred by ERISA's six-year statute of limitations.

We reverse and remand to the district court.[1]

STATUTORY BACKGROUND

ERISA, as modified by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), is designed to ensure the financial integrity of multiemployer pension funds. *See generally Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C.Cir.), *cert. denied*, 493 U.S. 918, 110 S.Ct. 280, 107 L.Ed.2d 260 (1989) One mechanism for attaining this goal is the Act's requirement that employers who withdraw from multiemployer plans remain liable for a statutory share of the plan's "unfunded vested benefits." *See* 29 U.S.C. §§ 1381, 1399; *Joyce*, 871 F.2d at 1120.

Much of the confusion surrounding this case is due to the fact that, at least with regard to the construction industry, when "complete withdrawal" occurs is determined differently under two different sections. The first determination under 29 U.S.C. § 1383(b)(2) is for the purpose of establishing whether the employer has, in fact, withdrawn and liability for continuing contributions has ended. The second determination is for the purpose of establishing the amount of withdrawal liability. The former determination is made under sections 1383(b)(2)(A) and (B). An employer is deemed to have completely withdrawn from the plan if:

[1] Thibodo cross-appeals the district court's denial of his motion for attorneys' fees. In light of our disposition, we dismiss the cross-appeal as moot.

> (A) [the] employer ceases to have an obligation to contribute under the plan, and
>
> (B) the employer—
>
> (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
>
> (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption,

29 U.S.C. §§ 1383(b)(2)(A), (B). It may readily be seen that conditions (A) and (B) may not be met for up to 5 years after an employer's duty to make regular contributions to the fund has ceased. Indeed, as we will see, the employer in the present case did not effectuate "complete withdrawal" until two years after it ceased contributions to the plan.

Different statutory provisions, however, determine the "date of complete withdrawal" for purposes of calculating the amount of withdrawal liability. For that purpose, the date of "complete withdrawal" is deemed to be the "date of the cessation of the obligation to contribute." 29 U.S.C. § 1383(e). This date, or, more accurately, the year in which this date falls, is instrumental in determining the amount of the employer's withdrawal liability. *See* 29 U.S.C. § 1391(b)(2) (amount of unfunded vested benefits that existed on the last date of the plan year preceding the year in which the employer withdrew is the amount for which the employer owes a contribution).

Civil actions to collect unpaid withdrawal liability amounts may not be brought after the later off: (1) six years after the date on which the cause of action arose; or (2) three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action, with one

exception not relevant to this case. *See* 29 U.S.C. § 1451(f).

FACTUAL BACKGROUND

The Trust is the plan sponsor for the Construction Laborers Pension Plan (the Plan). Thibodo Construction Co., Inc. contributed to the Plan pursuant to its collective bargaining agreement (CBA) with the Laborers Union until June 15, 1983, the date upon which the CBA expired. In early 1984, the Trustees believed that the company had withdrawn from the Plan and therefore owed withdrawal liability as provided in ERISA under the MPPAA. They sent the company an assessment notification and payment schedule. The company disputed the assessment, however, and in July 1984 the Trustees agreed that the assessment was erroneous because the company had not employed any laborers since the expiration of its CBA with the union. *See* 29 U.S.C. § 1383(b)(2)(B). The Trustees warned, however, that the company would owe withdrawal liability if it resumed hiring laborers.

In the Spring of 1985, the company resumed hiring laborers to perform work within the jurisdiction of the Plan. When the Trustees became aware of this resumption, they reinstated the company's withdrawal liability assessment, but the company made no payments to the Plan in response to the assessment. Nothing more transpired until April 1986, when the Trustees notified the company that it must begin making payments on the assessment within 60 days. Having received no payments from the company, the Trustees initiated this lawsuit in the district court on June 20, 1989, six years and five days after the expiration of the company's CBA.

The district court agreed to stay its proceedings so that the parties could submit the following issues for arbitration: (1) whether the company had completely withdrawn from the plan in 1983; and (2) whether Thibodo,

the company's sole shareholder, was personally and individually liable for the company's withdrawal liability. The arbitrator concluded that the company had withdrawn from the plan on June 15, 1983,[2] and that Thibodo was personally liable for the company's withdrawal liability.[3]

After the arbitrator's decision, the Trustees moved the district court to enforce the arbitration award. In opposition, Thibodo asserted that the Trustees' district court action had been filed beyond the limitations period provided in ERISA. The district court agreed with Thibodo and dismissed the action.

DISCUSSION

We must decide when the statute of limitations begins to run for actions to recover withdrawal liability payments under ERISA and the MPPAA. We hold that, for actions to recover withdrawal liability incurred as a result of com-

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[2] The Trustees dispute this determination by arguing that Thibodo had a legal obligation to continue payments to the plan for a short time beyond the CBA's expiration on June 15, 1983. *See* 29 U.S.C. § 1383(e) (date of complete withdrawal is the date that the employer ceased to have an obligation to contribute to the plan). Thus, they argue, the "date of complete withdrawal" was later than June 20, 1983. If this argument were accepted, then the Trustees' action would be timely regardless of whether the limitations period began to run on the "date of complete withdrawal" as defined in § 1383(e).

We need not address the question of when Thibodo's obligation to contribute ceased because we conclude that the limitations period does not run from the date of complete withdrawal as defined in § 1383(e). For the same reason we need not address the parties' contentions pertaining to: (1) whether the arbitrator improperly decided an issue not before it when it determined an exact date on which Thibodo withdrew; and (2) whether the district court should have deferred to the arbitrator's determination of the date of complete withdrawal.

[3] We express no opinion regarding the correctness of this determination.

plete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met. In this case, that date fell sometime in the Spring of 1985, when the company resumed work of the type for which contributions were previously required.

The district court concluded that the limitations period began running on June 15, 1983, which the arbitrator determined to be the "date of complete withdrawal" as defined in § 1383(e).[4] We repudiate that conclusion because, under the district court's approach, the limitations period was running against the Trustees before they acquired a cause of action against Thibodo. For purposes of limitations, Thibodo's complete withdrawal from the Plan occurred in the Spring of 1985 when his company resumed employing laborers, because only then were the statutory conditions for complete withdrawal met. 29 U.S.C. § 1383(b)(2). Before that time, the Trustees had no right to assess or receive withdrawal liability payments from Thibodo. Indeed, the Trustees realized as much in 1984 when they withdrew their original assessment. It is anomalous to conclude that the limitations period of § 1451(f) was running against the Trustees before they had a right to sue.

For the purpose of calculating the amount of withdrawal liability under § 1391, it is useful to fix the "date of complete withdrawal" as the date when the duty of regular contribution ceased. *See* 29 U.S.C. § 1383(e); *Joyce*, 871 F.2d at 1123. But in the case of a withdrawal in the construction industry, selection of such a date may involve a considerable period of relation back, as it does in the present case. The fact that it is useful to relate back for purposes of calculation of liability, however, does not mean that it is useful to relate back for purposes of the statute of limitations. Limitations run from "the date on which the cause of action arose." 29 U.S.C. § 1451(f)(1).

We conclude, therefore, that the limitations period of § 1451(f) begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met—in this case, the Spring of 1985. Because the Trustees' action was initiated within six years of the Company's resumption of covered work, their action is timely and the district court erred in dismissing it.

We recognize that our approach differs from that taken by the D.C. Circuit. In *Joyce*, that Circuit concluded that the limitations period does not begin to run until the plan makes a demand upon the employer for withdrawal liability payments and the employer refuses that demand.[5] *Joyce*, 871 F.2d at 1124; *see also ILGWU Nat'l Retirement Fund v. Smart Modes of Cal., Inc.*, 735 F.Supp. 103, 106 (S.D.N.Y.1990) (adopting *Joyce* approach in § 1383(a) withdrawal liability action). In our view, that approach improperly places the running of the limitations period in the control of the plaintiff.

In deciding that the limitations period does not begin to run until a demand for payments goes unmet, the District of Columbia Circuit was influenced by the difficulty of determining when an employer had "permanently" ceased to have an obligation to contribute or "permanently"

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[4] We note that Thibodo has been unable to cite to any federal court opinion in which this approach has been adopted. His assertion that the Seventh Circuit adopted this approach in *Trustees of Iron Workers Local 473 Pension Trust v. Allied Prods. Corp.*, 872 F.2d 208 (7th Cir.), *cert. denied*, 493 U.S. 847, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989), is erroneous. That case says nothing about when the limitations period for withdrawal liability actions begins to run. Our statement to the contrary in *Brentwood Financial Corp. v. Western Conference of Teamsters Pension Trust Fund*, 902 F.2d 1456, 1459 (9th Cir.1990), was incorrect. *See Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 170-71 (7th Cir.1993), *cert. denied* —— U.S. ——, 114 S.Ct. 1062, 127 L.Ed.2d 382 (1994).

[5] The District of Columbia Circuit's approach would not aid Thibodo, of course, because it selects a date even later than the one we choose.

ceased all covered operations, within the meaning of § 1383(a). *Joyce*, 871 F.2d at 1123-24. Whatever the difficulties might be under that subsection, we conclude that the construction industry provisions of § 1383(b) do not lead to debilitating uncertainty concerning whether an employer has completely withdrawn. Determining whether an employer continues to perform work of the type for which contributions were required, or resumes such work within 5 years is relatively straightforward. *See* 29 U.S.C. 1383(b)(2)(B).[6] We see no reason, therefore, to choose a date of limitations that is in the control of the plaintiff and, theoretically at least, might not be triggered for many years.[7] We also consider our rule to involve a more natural construction of § 1451(f), which sets the limitation as "6 years after the date on which the cause of action arose, or 3 years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such cause of action." There is little reason for the second clause if the cause of action does not come into existence until demand for payment is made and refused.

For these reasons, we decline to adopt the D.C. Circuit's approach—at least with respect to § 1383(b) withdrawals—and hold that for actions to collect withdrawal liability incurred under 29 U.S.C. § 1383(b), the limitations period found in 29 U.S.C. § 1451(f) begins to run on the date that the statutory conditions for withdrawal are

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[6] We do not decide whether the potential difficulties of determining when an employer has "permanently" ceased covered operations under § 1383(a) warrants adoption of the D.C. Circuit's approach in suits seeking recovery of withdrawal liability incurred under that section.

[7] The District of Columbia Circuit opined that there were several incentives for plan sponsors to act promptly in demanding payment of withdrawal liability. *Joyce*, 871 F.2d at 1126-27. There may be, but control still remains with the plaintiff.

met. Because the Trustees brought this action well within six years after that date, it is not time-barred.

No. 93-55079 REVERSED and REMANDED.

No. 93-55080 DISMISSED.

APPENDIX E

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), provides in relevant part as follows:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

. . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in

favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

. . . .

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sums of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits for each plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had

withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits is the sum of the employer's proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan

year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under

paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. . . .

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399(b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b)(1) of this title.

. . . .

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitraiton proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

. . . .

(d) Payments by employer prior to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected

by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

. . . .

(b) Failure of employer to make timely withdrawal liability payment within prescribed time.

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the prescribed time shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

. . . .

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

29 C.F.R. § 2644.2 Overdue and defaulted withdrawal liability; overpayment

(a) Overdue withdrawal liability payment. Except as otherwise provided in rules adopted by the plan in accordance with Sec. 2644.4, a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor.

(b) Default.

(1) Except as provided in paragraph (c)(1), 'default' means—

(i) The failure of an employer to pay any overdue withdrawal liability payment within 60 days after the employer receives written notification from the plan sponsor that the payment is overdue; and

(ii) Any other event described in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

(2) In the event of a default, a plan sponsor may require immediate payment of all or a portion of the outstanding amount of an employer's withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability.

(c) Plan review or arbitration of liability determination. The following rules shall apply with respect to the obligation to make withdrawal liability payments during the period for plan review and arbitration and with respect to the failure to make such payments:

(1) A default as a result of failure to make any payments shall not occur until the 61st day after the last of—

(i) Expiration of the period described in section 4219(b)(2)(A) of the Act;

(ii) If the employer requests review under section 4219(b)(2)(A) of the Act of the plan's withdrawal liability determination or the schedule of payments established by the plan, expiration of the period described in section 4221(a)(1) of the Act for initiation of arbitration; or

(iii) If arbitration is timely initiated either by the plan, the employer or both, issuance of the arbitrator's decision.

(2) Any amounts due before the expiration of the period described in paragraph (c)(1) shall be paid in accordance with the schedule established by the plan sponsor. If a payment is not made when due under the schedule, the payment is overdue and interest shall accrue in accordance with the rules and at the same rate set forth in Sec. 2644.3.

(d) Overpayments. If the plan sponsor or an arbitrator determines that payments made in accordance with the schedule of payments established by the plan sponsor have resulted in an overpayment of withdrawal liability, the plan sponsor shall refund the overpayment, with interest, in a lump sum. The plan sponsor shall credit interest on the overpayment from the date of the overpayment to the date on which the overpayment is refunded to the employer at the same rate as the rate for overdue withdrawal liability payments, as established under Sec. 2644.3 or by the plan pursuant to Sec. 2644.4.

29 C.F.R. § 2644.3 Interest on overdue, defaulted and overpaid withdrawal liability

(a) Interest assessed. The plan sponsor of a multiemployer plan—

(1) Shall assess interest on overdue withdrawal liability payments from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e); and

(2) In the event of a default, may assess interest on any accelerated portion of the outstanding withdrawal liability from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e).

. . . .

(d) Due date. Except as otherwise provided in rules adopted by the plan, the due date from which interest accrues shall be, for an overdue withdrawal liability payment and for an amount of withdrawal liability in default, the date of the missed payment that gave rise to the delinquency or the default.

(e) Date paid. Any payment of withdrawal liability shall be deemed to have been paid on the date on which it is received.

Supreme Court, U.S.
FILED
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No. 96-370

In The

Supreme Court of the United States

October Term, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,

Petitioner,

vs.

FERBAR CORPORATION OF CALIFORNIA, INC., STEPHEN J. BARNES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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LIST OF INTERESTED PARTIES

Ferbar Corporation has no parent companies or nonwholly owned subsidiaries.

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Petitioner, a multiemployer trust fund, asks this Court to issue a writ of certiorari to review the Ninth Circuit's *per curiam* opinion in this case. The Court should decline because (a) resolving the conflict between the Ninth Circuit and the other circuits will not change the outcome in this case and the split between the Seventh and Third Circuits was not addressed by the courts below; (b) Petitioner seeks review of an issue that is largely moot with regard to the functioning of multiemployer pension plans nationwide; and (c) so long as the trustees comply with their fiduciary duty, the question presented should never arise.

OPINION BELOW

Respondents concur with Petitioner's statement concerning the opinion below.

STATEMENT OFJURISDICTION

Respondents concur with Petitioner's statement concerning the Court's jurisdiction.

STATUTES INVOLVED

In addition to the sections of the Multiemployer Pension Plan Amendments Act (MPPAA) cited by Petitioner, the following sections are relevant to the Court's decision:

> **§ 1001a Additional Congressional findings and declarations of policy**
>
> **(a) Effects of multiemployer pension plans**
>
> The Congress finds that —

* * *

(4)(A) withdrawals of contributing employers from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants, and beneficiaries, and labor management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in paragraph (A) are exacerbated.

29 U.S.C. § 1001a.

§ 1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. . . .

29 U.S.C. § 1104.

STATEMENT OF THE CASE

A. Statutory Scheme

As the Court has repeatedly explained, first in *Pension Benefit Guaranty Corporation v. Gray*, 467 U.S. 717 (1984), then in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986), then again in *Concrete Pipe and Products of California v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), and yet again in *Milwaukee Brewery Workers' Pension Plan v. Schlitz Brewing Co.*, 115 S. Ct. 981 (1995), the MPPAA was passed both to deter employers from withdrawing from multiemployer pension plans, and to protect the plans when they do. As Justice Breyer aptly explained in a unanimous decision early last year:

> MPPAA helps solve a problem that became apparent after Congress enacted the Employee Retirement Income Security Act of 1974. ERISA helped assure private sector workers that they would receive the pensions that their employers had promised them. To do so, among other things, ERISA required employers to make contributions that would produce pension-plan assets

sufficient to meet future vested pension liabilities; . . . and, if a plan became insolvent, it held any employer who had withdrawn from the plan during the previous five years liable for a fair share of the plan's underfunding.

Unfortunately, this scheme encouraged an employer to withdraw from a financially shaky plan and risk paying its share if the plan later became insolvent, rather than to remain and (if others withdrew) risk having to bear alone the entire cost of keeping a shaky plan afloat, Consequently, a plan's financial troubles could trigger a stampede for the exit door, thereby ensuring the plan's demise. MPPAA helped eliminate this problem by changing the strategic considerations. It transformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty. That is to say, it imposed a withdrawal charge on all employers withdrawing from an unfunded plan (whether or not the plan later became insolvent). And, it set forth a detailed set of rules for determining, and collecting, that charge.

Schlitz Brewing Co., 115 S. Ct. at 985 (citations omitted).

Thus, the problem prior to the MPPAA was employer withdrawals from multiemployer plans. That Congress considered these withdrawals harmful to pension plans is clear beyond cavil. 29 U.S.C. § 1001a(a)(4)(A) states:

> Withdrawals of contributing employers from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants, and beneficiaries, and labor management relations. . . .

To cure this harm, Congress passed the MPPAA which requires a withdrawing employer to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation. *Connolly*, 475 U.S. at 216. Thus, under the MPPAA, "if an employer withdraws from a multiemployer plan, it incurs withdrawal liability in the form of a fixed and certain debt to the pension plan." *Concrete Pipe*, 508 U.S. at 609. The scheme for determining and collecting this debt is, for current purposes, adequately set out in Petitioner's brief. (Pet. Brief at 2-3).

B. Facts

For the past six years, Respondent Ferbar Corporation has been an out-of-business laundry and Respondent Stephen Barnes has been its sole shareholder (collectively "Ferbar" or "Respondents"). However, at the time of the circumstances initially giving rise to this suit — some eleven years ago — Ferbar operated two laundries, Superior French Laundry and One Hour Martinizing. (Pet. App. at 7a). In March of 1985, the employees of these laundries decided they no longer wanted to be represented by a union, and Ferbar withdrew recognition and stopped making contributions to a local pension plan (Pet. App. at 7a; Amended Agreement and Declaration of Trust at 1, 4), Petitioner Bay Area Laundry and Dry Cleaning Trust Fund ("Petitioner" or "the Fund").[1] Despite its statutory obligation

1. The Bay Area referred to is the San Francisco Bay Area.

to then calculate the employer's withdrawal liability and demand payment "as soon as practicable," 29 U.S.C. § 1399(b), the Fund did nothing for almost two years.

On December 12, 1986, the Fund finally sent a notice to Superior French Laundry claiming a $45,580.80 withdrawal liability obligation, as well as a payment schedule requesting the first quarterly installment by February 1, 1987. (Pet. App. at 7a). Ferbar did not pay, and the Fund did nothing. On February 27, 1987, Ferbar requested a review of the Fund's assessment. (Pet. App. at 7a). The Fund did not respond. (Defendants' Motion For Attorney's Fees at 2). On April 14, 1987, the Fund notified Ferbar it was delinquent and that it would be considered in default if it did not pay within 60 days. (Pet. App. at 7a). On April 28, 1987, Ferbar answered, referring to its previous response and asking when an answer would be forthcoming. (Defendants' Motion for Attorney's Fees at 2-3). On July 8, 1987, after not hearing from the Fund on the assessment issue, Ferbar requested arbitration. (Defendants' Motion for Attorney's Fees at 3). The Fund did not respond. (Defendants' Motion for Attorney's Fees at 3). After that, Ferbar eventually went out of business and Respondent Barnes got on with his life. (Defendants' Motion for Attorney's Fees at 2). Out of the blue, on February 9, 1993 — six years and eight days after the initial payment was due, and almost eight years after Ferbar withdrew from the pension plan — the Fund filed the present lawsuit. (Pet. App. at 7a; Defendant's Motion for Attorney's Fees at 3).

C. Proceedings

The District Court granted summary judgment in favor of Ferbar on this $45,000 claim. The Fund then appealed and the Ninth Circuit affirmed the district court. The Fund then moved for rehearing and rehearing *en banc*, which the Ninth Circuit

denied. The District Court and Court of Appeals opinions can be found in the Petitioner's Brief at Appendices A through C. The cases speak for themselves and Respondent will not reiterate them here.

This brings us to today. The Fund has aggressively litigated this $45,000 case through every step of the expensive appellate process. (Respondents' attorney's fees, up to the summary judgment motion alone, were $12,962.50 — which counsel reduced to $ 5,920 because Ferbar was inactive and Barnes a man of limited means. (Defendants' Motion for Attorney's Fees at 7)). Any hearing before the Supreme Court would be prohibitively expensive for Respondents.

REASONS FOR DENYING THE WRIT

I.

A CONFLICT BETWEEN THE CIRCUITS IS NOT, IN AND OF ITSELF, REASON TO ISSUE A WRIT OF CERTIORARI.

Respondents concede there is an apparent conflict in the circuits on the question presented. However, the conflict (which Petitioner overstates) is academic, with no real practical importance. Large multiemployer pension plans — as well as small ones like Petitioner, which operate in just one circuit — can certainly live with the conflict. After all, conflicts between the circuits are ubiquitous. What really matters is whether the issue to be addressed is "important." Supreme Court Rule 10(a). That is where this petition fails.

A. Resolving The Conflict Between The Ninth Circuit And The Other Circuits Will Not Affect The Outcome In This Case.

The broad conflict between the circuits is this. The Ninth Circuit believes a cause of action for withdrawal liability arises when an employer withdraws. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996) (*per curiam*). Three other circuits believe a cause of action arises when the employer's first payment becomes overdue. *Board of Trustees Of The Dist. No. 15 Machinists Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 859 (3d Cir. 1994); *Central States Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994); *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).[2] This conflict makes no difference in the present case, for Respondents win both ways. The suit was filed more than six years after its first payment was overdue, and Respondents withdrew almost two years prior to that. The Supreme Court, which is not in the business of issuing advisory opinions, *Laird v. Tatum*, 408 U.S. 1 (1972), should not take a case to resolve an issue that would not affect the judgment of the court below.

B. The Conflict Between The Seventh And Third Circuits Will Rarely Arise, And Should Not Be Resolved Through A Ninth Circuit Case Which Did Not Address The Issue.

The narrower issue Petitioner wants the Court to reach — whether a separate limitations period exists for each withdrawal liability installment payment — has only been

2. Contrary to Petitioner's representations, *Giroux Bros. Trans., Inc. v. New England Teamsters & Trucking Indust. Pension Fund*, 73 F.3d 1 (1st Cir. 1996), does not address the issue.

addressed by the Seventh and Third Circuits. The Seventh Circuit believes the limitations period on the entire claim runs from the time the first payment is overdue. *Navco*, 3 F.3d at 172. The Third Circuit thinks not, holding that if an installment payment plan is used, each installment has its own six year limitations period. *Board of Trustees Of The Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852, 859 (3d Cir. 1994). Under the Seventh Circuit's interpretation, Respondents win again. Only if the Court adopts wholesale the Third Circuit's approach will Respondents lose — and then only partially.

As an initial matter, the Court need not resolve this conflict because it will rarely, if ever, arise. As the Seventh Circuit stated in *Navco*:

> Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment as soon as practical after an employer's complete or partial withdrawal.

Id. at 173. Only those trustees which wait more than six years to file suit after assessing, scheduling, and demanding payment will miss the deadline. And given Congress's express declaration that trustees not tarry in collecting payment, trustees should not wait that long.

Furthermore, although resolution of the Seventh/Third Circuit split could conceivably alter the judgment in favor of Respondents, that alone is not enough to grant a writ of certiorari. This defunct employer should not bear the burden of resolving a conflict between two circuits which have no obvious jurisdiction over either the Petitioner or Respondents,

especially when the issue giving rise to the conflict was never addressed in the courts below.

II.

BECAUSE THE MAJORITY OF MULTI-EMPLOYER PENSION FUNDS ARE FULLY FUNDED, THE QUESTION PETITIONER WANTS ADDRESSED WILL RARELY ARISE.

Another reason for denying the petition is that withdrawal liability in general is no longer a pressing issue.

As noted previously, the purpose of withdrawal liability is to make sure employees receive their vested benefits. It does so by requiring a withdrawing employer to pay "its proportionate share of the plan's unfunded vested benefits." *Concrete Pipe*, 508 U.S. at 609. Determining the extent to which vested benefits are "unfunded" is easy enough: an actuary calculates the present value of the vested benefits and subtracts the value of the plan's assets. The difference is "unfunded." *Id.* at 610. Obviously, if the plan's assets exceed the present value of the vested benefits, then there are no unfunded vested benefits, and, consequently, no withdrawal liability. *Id.* (noting that employer's withdrawal liability is a proportion of the *unfunded* vested liability); 29 U.S.C. § 1391(b)(1). That is the current situation with most multiemployer pension plans.

A 1995 survey, published by The Segal Company, of 475 multiemployer pension plans shows that 65% of plans are 100% funded, 82% of plans are at least 90% funded, and 93% of plans are at least 80% funded. THE SEGAL COMPANY, SURVEY OF THE FUNDED POSITION OF MULTIEMPLOYER PLANS 4 (1995). And the average ratio of assets to vested benefits is 95%. *Id.* The survey concludes that "multiemployer plans continue to be well-

funded and continue to have, on average, a high funded ratio." *Id.* at 10.

In most cases, then, an employer withdrawing from a multiemployer plan will have *no* withdrawal liability, and no statute of limitations issue (or any other issue) will arise. As for those plans that are not fully funded, the unfunded portion is likely to be small; an employer's potential withdrawal liability will of course be smaller; and the number of instances where the statute of limitations issue will arise given its six year length will be smaller still. The need to utilize this Court's resources to resolve this minor issue diminishes correspondingly.

III.

THE FIDUCIARY DUTY TO EXPEDITIOUSLY DEMAND AND COLLECT WITHDRAWAL LIABILITY RENDERS THE LATER COMMENCEMENT OF THE STATUTE OF LIMITATIONS OF LITTLE PRACTICAL EFFECT.

Finally, Petitioner makes much of the fact that other sections of ERISA and the MPPAA encourage the trustee to act quickly in determining and collecting withdrawal liability. This fact alone is sufficient reason to deny the petition.

Regardless of when a cause of action arises in withdrawal liability cases, a trust fund has at least six years — 72 months — to bring suit. 29 U.S.C. § 1451(f). This is, as the Seventh Circuit noted, more than generous. *Navco*, 3 F.3d at 171. It is also unnecessary. In no case will a cause of action arise until the trust learns of the withdrawal. 29 U.S.C. § 1451(f)(2). After that, a fund must assess, schedule, and demand payment "as soon as practicable." 29 U.S.C. § 1399(b)(1). In *Schlitz Brewing Co.*, the Court noted this could take as little as a day. *Id.*

at 987. The Seventh Circuit noted that it should be done in a matter of weeks. *Navco*, 3 F.3d at 171. No later than sixty days after the demand (but certainly earlier), whenever the employer's first payment becomes overdue, the trust fund may bring suit. *Id.*, 29 U.S.C. § 1399(c)(2).

Assume, conservatively, that after withdrawal it takes an entire month for a trust fund to calculate the withdrawal liability and demand payment. Assume also that the fund gives the employer a full two months to make, and miss, its first payment. The difference between the withdrawal and the time of the first payment is at most three months. Under this scenario, in the Ninth Circuit — where the cause of action arises upon withdrawal — the fund still has 69 months after the missed payment to file suit. In the other circuits cited by Petitioner — where the cause of action arises when the first payment is overdue — the fund has 72 months. With a six year limitations period, this three month difference is negligible. Any trustee that cannot find time to file a boilerplate complaint either 69 or 72 months after a cause of action arises should not be managing a multiemployer pension fund. Petitioner's argument that the statute of limitations should run from a later starting point only results in allowing a trustee even longer to commence the action. If it waits so long to act, however, it will further open itself to charges that it has breached its fiduciary duty. Given this fact, it is unlikely that any trustee would avail itself of the extra time.

In short, trustees have a fiduciary duty to collect, when possible, withdrawal liability from employers. 29 U.S.C. § 1104. Waiting around more than six years to do so potentially violates that duty, for, as in the present case, the employer might not be around that long. Furthermore, failing to collect withdrawal liability in a timely manner exasperates the very harm the MPPAA was meant to cure: The remaining employers

are forced to keep an underfunded plan afloat while the trustee sits on its hands. No trustee worth its salt will violate its fiduciary duty in this way. Thus the statute of limitations issue Petitioner eagerly wants addressed should rarely arise.

For much the same reason, the narrow split between the Seventh and Third Circuits has no practical importance. As the Seventh Circuit noted:

> Statutes of Limitations serve vital societal interests — the usual ones of preventing stale claims that may be hard to prove, and protecting the interest of potential defendants in knowing their liabilities, and in the MPPAA the unusual one of protecting the beneficiaries of the fund. Congress told the trustees of pension funds *not to tarry* in assessing and collecting liability. The fund shall compute liability and demand payment as soon as practical after an employer's complete or partial withdrawal.
>
> * * *
>
> [W]e believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

Navco, 3 F.3d at 173 (citations omitted). Though the Third Circuit holds that each installment payment has a separate statute of limitations, *Kahle*, 43 F.3d at 861, this is not a holding upon which any responsible fiduciary would rely. Even if, twenty-six years out, a fiduciary could bring a cause of action

for withdrawal liability, fiduciaries concerned with their duties under 29 U.S.C. § 1104 would never prudently wait that long.

Accordingly, the question presented by petitioner is an academic one. Responsible fiduciaries, regardless of when the cause of action arises, will always act well before the six year statute of limitations runs.

IV.

THE NINTH CIRCUIT'S OPINION IN THE PRESENT CASE IS CORRECT.

Though the Court has no reason to consider the issues raised in these lower court decisions, it should know that the Ninth Circuit's position — that the cause of action arises upon withdrawal — is correct.

Generally, a cause of action accrues, or "arises," when there is a harm. As the D.C. Circuit noted, an action may be brought against an employer under 29 U.S.C. § 1451(a) when a plan has been "adversely affected by the act or omission of any party under this subtitle." *Joyce*, 871 F.2d at 1122. This, unfortunately, begs the question of what act adversely affects a plan. However, the specific language of the MPPAA, as well as its purpose, make clear that the act which adversely affects the plan is the employer's withdrawal.

With regard to the statutory language, Congress specifically found that "*withdrawals of contributing employers* from pension plans frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, *adversely affecting the plan*, its participants, and beneficiaries, and labor management relations." 29 U.S.C. § 1001a(a)(4)(A) (emphasis added). The same phrase

("adversely affecting" and "adversely affected") appears in both § 1001a and § 1451. Section 1001a clarifies, by implication, what act or omission causes the harm and thus gives rise to the cause of action: namely, the employer's withdrawal. It results in a decrease in the contributions to the fund and a heavier burden on the remaining employers.

This understanding is buttressed by the MPPAA as a whole. As stated time and time again by this Court, the MPPAA was passed to alleviate the harm caused by employer withdrawals from pension plans. *Schlitz Brewing Co.*, 115 S. Ct. at 985. How can this obvious harm — the purpose of the statute — not give rise to a cause of action on behalf of the plan, its beneficiaries, or the remaining employers?

CONCLUSION

In recent years, this Court has spent a great deal of time addressing issues arising under the MPPAA. *Infra* at 3. Fortunately, it can now rest (for a time at least) from its work on this statute: Most multiemployer pension plans are fully funded, issues concerning withdrawal liability are no longer pressing, and they need not command the Court's attention. The question presented in this case, in particular, is unworthy. The conflict Petitioner hopes to resolve should simply not be an issue. A statute of limitations longer than six years is only important to dilatory trustees, and there are few of those. So long as trustees compiy with their ERISA-imposed fiduciary duties, they will never miss the overly generous six year statute of limitations allowed by Congress.

Respectfully submitted,

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OCTOBER TERM, 1996

BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, PETITIONER

v.

FERBAR CORPORATION OF CALIFORNIA, INC., AND STEPHEN BARNES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether the statute of limitations for an action to collect withdrawal liability under Section 104(2) of the Multiemployer Pension Plan Amendments Act, 29 U.S.C. 1451(f), begins to run on the date an employer withdraws from a pension plan or some other date.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.[1]

[1] The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. 1381 *et seq.* The PBGC has an interest because this case requires an interpretation of 29 U.S.C. 1451(f), which governs the time for filing a civil action under MPPAA. In addition, the PBGC has an interest because petitioner is an insolvent multiemployer pension plan entitled to receive financial assistance from the PBGC under 29 U.S.C. 1431. If petitioner prevails in this litigation, the PBGC's obligations under 29 U.S.C. 1431 could be reduced.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutory and regulatory provisions set out at Pet. App. 30a-49a, the following provisions of 29 U.S.C. 1382, 1399 and 1451, as added to Title IV of the Employee Retirement Income Security Act of 1974 (ERISA) by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1217, are relevant to this case:

1. Section 1382 of Title 29 U.S.C. provides:

Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of withdrawal liability from the employer.

2. Section 1399 of Title 29 U.S.C. provides, in relevant part:

Notice, collection, etc., of withdrawal liability

* * * * *

(c) Payment requirements; amount etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 and then under section

1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C) * * *. Actual payment shall commence in accordance with subparagraph (2).

(ii) The determination of the amortization period described in clause (i) shall be based on the assumptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

* * * * *

3. Section 1451 of Title 29 U.S.C. provides, in relevant part:

Civil Actions

* * * * *

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

* * * * *

STATEMENT

1. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), an employer that withdraws from a multiemployer pension plan is required to pay

"withdrawal liability," calculated pursuant to one of four statutory methods for determining the employer's allocable share of the plan's unfunded vested liabilities. 29 U.S.C. 1381, 1391. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to pay a "proportionate share of the plan's 'unfunded vested benefits.'" *Connolly* v. *PBGC*, 475 U.S. 211, 217 (1986) (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984)). By requiring a withdrawing employer to pay its fair "share of the plan's obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations would not fall on the remaining employers and discourage new employers from joining the plan. *Gray*, 467 U.S. at 721-723. Withdrawal liability is thus the cornerstone of Congress's efforts to protect multiemployer plan participants against benefit losses.

A "complete withdrawal" from a multiemployer pension plan occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a). When an employer withdraws from a multiemployer plan, MPPAA requires the plan sponsor (usually a joint labor-management board of trustees, 29 U.S.C. 1002(16)(B)) to "(1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." 29 U.S.C. 1382.

"As soon as practicable" after an employer's withdrawal, MPPAA requires the plan sponsor to notify the employer of its withdrawal liability and the schedule for liability payments, and to demand payments in accordance with that schedule. 29 U.S.C. 1399(b)(1). The schedule must amortize the amount of withdrawal liability in "level

annual payments" in accordance with a statutory formula, based in part on the employer's previous contributions to the plan. 29 U.S.C. 1399(c)(1)(A)(i) and (C)(i). For amortization periods that exceed 20 years, the employer's liability usually is limited to the first 20 annual payments. 29 U.S.C. 1399(c)(1)(B). The Act requires the plan sponsor to set forth a schedule for payment of the annual amount of withdrawal liability in four equal installment payments due quarterly or at other intervals specified by plan rules. 29 U.S.C. 1399(c)(3). The Act also permits the employer, however, "to prepay the outstanding amount of the unpaid annual withdrawal liability," plus accrued interest. 29 U.S.C. 1399(c)(4). See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 115 S. Ct. 981, 986 (1995).

Within 90 days after the employer receives the plan sponsor's notice and demand for payment, the employer is entitled to ask the plan sponsor "to review any specific matter relating to the determination of the employer's liability and the schedule of payments." 29 U.S.C. 1399(b)(2)(A)(i). "After a reasonable review of any matter raised," the plan sponsor must notify the employer of the plan sponsor's decision and the reasons for that decision. 29 U.S.C. 1399(b)(2)(B).

MPPAA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. 1381-1399] shall be resolved through arbitration." 29 U.S.C. 1401(a)(1). Either party may initiate arbitration within a 60-day period ending after the earlier of (1) the date of notification to the employer of the plan sponsor's decision under 29 U.S.C. 1399(b)(2)(B), or (2) 120 days after the date of the employer's request for review under 29 U.S.C. 1399(b)(2)(A). See 29 U.S.C. 1401(a)(1).

"[N]otwithstanding any request for review or appeal of determinations of the amount of [withdrawal] liability or of the schedule," the employer's withdrawal liability becomes "payable in accordance with the schedule set forth by the plan sponsor" beginning no later than 60 days after the date of the plan sponsor's demand. 29 U.S.C. 1399(c)(2). Similarly, "until the arbitrator issues a final decision with respect to the determination submitted for arbitration," the employer is required to make payments in accordance the plan sponsor's schedule of payments, subject to "any necessary adjustments in subsequent payments for overpayments or underpayments" arising out of the arbitrator's decision. 29 U.S.C. 1401(d). If no arbitration proceeding has been initiated within the period prescribed by 29 U.S.C. 1401, "the amounts demanded by the plan sponsor under [29 U.S.C. 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor," and "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. 1401(b)(1).

In the event of "default," "a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. 1399(c)(5). A PBGC regulation further provides that, upon default, a plan sponsor may require immediate payment of only a portion of the outstanding amount of the employer's liability. 29 C.F.R. 4219.31(b)(2).[2] If the plan sponsor chooses the latter course, the sponsor must establish a new schedule of payments for the remaining amount. *Ibid.*

[2] Prior to July 1, 1996, regulations promulgated under MPPAA by the PBGC appeared at 29 C.F.R. Pts. 2640-2677.

The Act defines "default" to include "the failure of an employer to make, when due, any payment under [29 U.S.C. 1399], if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. 1399(c)(5)(A); see also 29 C.F.R. 4219.31(b)(1).[3] PBGC regulations also set forth rules that apply to the employer's obligation to make withdrawal liability payments during the period for plan review and arbitration. In those instances, a default as a result of a failure to make payments does not occur until the sixty-first day after the last of (1) the expiration of the 90-day period within which the employer may request review under 29 U.S.C. 1399(b)(2)(A); (2) if review is requested within those 90 days, the expiration of the period within which arbitration may be initiated under 29 U.S.C. 1401(a)(1); or (3) if arbitration is timely initiated, the date the arbitrator issues a decision. 29 C.F.R. 4219.31(c)(1).

A plan fiduciary "who is adversely affected by the act or omission of any party" under MPPAA "may bring an action for appropriate legal or equitable relief" in federal district court. 29 U.S.C. 1451(a)(1) and (c). Such action is barred "after the later of—(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." 29 U.S.C. 1451(f).

2. For several years, respondent Ferbar Corporation contributed to the Bay Area Laundry and Dry Cleaning

[3] 29 C.F.R. 4219.31(a) defines an "overdue" withdrawal liability payment as one "not paid on the date set forth in the schedule of payment established by the plan sponsor."

Pension Trust Fund (Fund). In March 1985, Ferbar ceased making contributions to the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. Pet. App. 2a. The notice stated that Ferbar could discharge its withdrawal liability obligation by paying the total amount within 60 days of receipt of the letter, or by paying monthly installment payments of $345.50 for 240 months (with a final payment of $344.96), beginning February 1, 1987. *Id.* at 2a-3a; Compl. ¶ 14; C.A. E.R. Tab 13. Ferbar made no payments in response to the Fund's demand.

In a letter dated February 27, 1987, Ferbar requested that the Fund review its assessment of withdrawal liability. In a letter dated April 14, 1987, the Fund notified Ferbar that its first payment was delinquent and that Ferbar had 60 days from the date of that notice to cure the delinquency, or it would be considered in default. Pet. App. 3a. Ferbar failed to cure its delinquency, but in a letter dated April 28, 1987, Ferbar referred to its previous response and asked when the Fund's answer would be forthcoming. *Ibid*; Br. in Opp. 6. In a letter dated July 8, 1987, Ferbar requested arbitration of its disputed withdrawal liability. Pet. 5. No arbitration proceedings were held, and Ferbar did not make any withdrawal liability payments. Pet. App. 7a; Br. in Opp. 6.

On February 9, 1993, petitioner, the Board of Trustees of the Fund, filed a complaint against Ferbar and its shareholder, Stephen Barnes, in the United States District Court for the Northern District of California to collect the employer's withdrawal liability.[4] The parties filed

[4] Petitioner also sued Ferreira Farms, Inc., and Diablo Cleaners, Inc., two dry cleaners, and Robert J. Ferreira, a shareholder in Ferreira Farms, Diablo Cleaners, and Ferbar. Compl. ¶¶ 7-10. On June 3, 1994, petitioner dismissed those defendants from the complaint. C.A. E.R. Tab 31.

cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the district court granted summary judgment in favor of respondents. *Id.* at 6a-19a. The court first held that the suit was barred by the three-year limitations period set forth in 29 U.S.C. 1451(f)(2), because "plaintiffs knew a cause of action existed no later than 1987, yet filed their complaint in excess of three years of that time." Pet. App. 11a (citation omitted). In the alternative, the court held that petitioner's action was barred by the six-year limitations period set forth in 29 U.S.C. 1451(f)(1). Pet. App. 11a-19a. The court reasoned that the Fund was "adversely affected when the first monthly payment was not made" by the February 1, 1987 due date and, therefore, that petitioner's "cause of action arose and, concomitantly, the statute of limitations began running," on February 1, 1987. *Id.* at 13a. Because February 1, 1987 "preced[ed] the filing of the lawsuit by more than six years," the court concluded that the action was time-barred. *Id.* at 19a.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1a-5a. The court of appeals first held that the district court erred in relying on the three-year limitations period set forth in 29 U.S.C. 1451(f)(2). The court explained that "the district court misread the plain language of [29 U.S.C.] 1451(f), which clearly directs courts to apply 'the later of' the two periods of limitations." Pet App. 3a. "On the facts of this case," the court concluded, the later limitations period "is six years from the date the cause of action arose." *Ibid.*

Turning to the district court's alternative holding that petitioner's cause of action became time-barred six years after February 1, 1987, the date on which the employer

missed its first installment payment, the court of appeals determined that its decision in *Board of Trustees* v. *Thibodo*, 34 F.3d 914 (9th Cir. 1994), cert. denied, 115 S. Ct. 1361 (1995), was controlling. In *Thibodo*, the Ninth Circuit held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-917. The court of appeals recognized that "*Thibodo* by its terms applies only to actions arising under 29 U.S.C. § 1383(b), which defines the conditions for complete withdrawal only in the building and construction industry," and that the present case is governed by 29 U.S.C. 1383(a), which defines complete withdrawal for most other industries. Pet. App. 4a-5a. The court saw "no basis for distinguishing" the two types of actions, however, and concluded that "the period of limitations began running in March, 1985, when [respondent] effected a complete withdrawal from the Fund." *Id.* at 5a. Because the Fund's February 9, 1993, complaint was filed more than six years later, the court of appeals affirmed the district court's order granting summary judgment for respondents on the ground that the action is time-barred. *Ibid.*

Judge Trott wrote a concurring opinion. Pet. App. 5a. In his view, the decision in *Thibodo* compelled the result reached by the court. *Ibid.* He expressed the view, however, that the decision of the United States Court of Appeals for the District of Columbia Circuit in *Joyce* v. *Clyde Sandoz Masonry*, 871 F.2d 1119, cert. denied, 493 U.S. 918 (1989) "does a better job of answering the questions" posed by this case. Pet. App. 5a. In *Joyce*, the court held that a pension plan's cause of action for withdrawal liability does not arise on the date an employer effects a complete withdrawal. Rather, the court held that

an employer's failure to pay a scheduled payment triggers the running of the limitations period under MPPAA. 871 F.2d at 1122-1124.

DISCUSSION

There are approximately 2,000 defined-benefit multiemployer pension plans in the United States, covering an estimated 8.7 million active and retired workers. As construed by the court of appeals, the limitations period in 29 U.S.C. 1451(f)(1) would be immediately triggered every time an employer withdraws from one of those plans, before the plan sponsor has even determined the amount of the employer's liability and set a payment schedule. If a plan sponsor's cause of action to collect withdrawal liability payments arises on the date of withdrawal, the plan sponsor's ability to collect withdrawal liability payments could be significantly affected. The circuits are in conflict on the proper date on which a cause of action arises in a suit by a plan sponsor to collect an employer's withdrawal liability. Many large multiemployer plans—such as amicus Central States, Southeast and Southwest Areas Pension Fund—have contributing employers in several States. The plans and their contributing employers may thus be subject to different statutes of limitations, depending on the happenstance of the forum for litigation. Review of the statute of limitations issue by this Court therefore is warranted.

1. Under the Ninth Circuit's decision in this case, a cause of action for collection of withdrawal liability arises on the date of withdrawal. The Third, Seventh, and District of Columbia Circuits have taken contrary views.

a. In *Joyce* v. *Clyde Sandoz Masonry*, 871 F.2d 1119, cert. denied, 493 U.S. 918 (1989), the District of Columbia Circuit rejected the view that the six-year limitations period commences on the date of the employer's complete

withdrawal from the plan. The court reasoned that "[t]he employer's complete withdrawal, without more, is an occurrence that hardly affects the plan adversely, but merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment." 871 F.2d at 1124. The court also observed that under MPPAA, "[b]y virtue of withdrawal alone * * *, the employer is not immediately obligated to make payments, nor is the plan * * * entitled to receive any such payments." *Id.* at 1123. Instead, the court noted, a plan is "adversely affected" under 29 U.S.C. 1451(a) only once the plan "fails to receive the payment it has demanded and to which it is entitled." *Id.* at 1124. Thus, the court concluded that it is the employer's "failure to pay the sum demanded" that "giv[es] rise to a cause of action," *id.* at 1122, and therefore triggers the running of the limitations period.

b. The D.C. Circuit's decision in *Joyce* did not directly address the further refinement of the statute of limitations issue that was confronted by the Third Circuit in *Board of Trustees* v. *Kahle Engineering Corp.*, 43 F.3d 852 (1994), and the Seventh Circuit in *Central States Pension Fund* v. *Navco*, 3 F.3d 167 (1993), cert. denied, 510 U.S. 1115 (1994).

The Seventh Circuit in *Navco* held that a claim to collect withdrawal liability under MPPAA "accrues as soon as payment becomes overdue." 3 F.3d at 172. The court concluded, however, that a fund "ha[s] only one *claim* against the employer * * * : the amount of withdrawal liability." *Ibid.* The court reasoned that "[a]lthough a fund may permit an employer to amortize this sum over 20 years, the whole amount is presumptively due at the outset." *Ibid.* Thus, according to the Seventh Circuit, "the financing options under [Section] 1399(c) do not break this single debt into little pieces with their own statutes

of limitations," *ibid.*, and the statute of limitations for collecting the entire outstanding balance is triggered whenever the employer misses a single payment, *id.* at 172-173.

In *Kahle*, the Third Circuit rejected the Seventh Circuit's view that a plan sponsor has only one cause of action to sue for an employer's failure to pay its withdrawal liability. The Third Circuit saw the employer's obligation to make scheduled payments under MPPAA as "akin" to an installment contract, in which "a new cause of action arises from the date each payment is missed." 43 F.3d at 857 (citing 4 Arthur L. Corbin, *Contracts* § 951 (1951)). The court thus concluded that "[a]bsent a decision by the [f]und to accelerate," a fund is "not time-barred from bringing suit for the total of the * * * payments which fell due within the six years prior to the filing of * * * suit." *Id.* at 861.

2. a. The confusion that this disparate appellate authority has generated for plan administrators and contributing employers is manifest. Multiemployer plans may have contributing employers conducting business in several circuits. Those plans and employers are currently subject to at least three different rules for when the statute of limitations begins to run on an action to collect an employer's withdrawal liability. See Central States, Southeast and Southwest Areas Pension Fund Amicus Br. 4-5. Plans and their contributing employers cannot be certain how to apply the law, and they may find themselves involved in litigation in any of several jurisdictions operating under differing versions of the same limitations law.[5]

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[5] An action to collect withdrawal liability may be brought "in the district where the plan is administered or where a defendant resides or does business." 29 U.S.C. 1451(d).

This conflict in the circuits places plan trustees in a difficult position, because they have a fiduciary duty to take appropriate steps to collect money owed to the plan. See 29 U.S.C. 1104(a)(1); *Central States Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 571 (1985). The plan trustees' fiduciary duty extends to pursuing collection of withdrawal liability. 29 U.S.C. 1381, 1399(b)(1). Because the circuits have reached inconsistent conclusions on the statute of limitations question that this case presents, review by this Court is warranted in order to furnish uniform guidance to plan trustees in the fulfillment of their fiduciary responsibilities under ERISA.

Respondents argue (Br. in Opp. 10-11) that because the majority of multiemployer pension plans are fully funded, the question presented infrequently arises. In support of that proposition, respondents point to a 475-plan survey in which those plans were found to be fully or mostly funded. *Ibid.* (citing The Segal Company, *Survey of The Funded Position Of Multiemployer Plans* 3-4 (1995)). That survey is consistent with a recent PBGC study concluding that MPPAA is achieving its goal of reducing plan underfunding and thereby protecting workers' retirement benefits. See Pension Benefit Guaranty Corp., *The Financial Condition of PBGC's Multiemployer Insurance Program: A Five-Year Report to Congress as Required by Section 4022A(f) of the Employee Retirement Income Security Act of 1974, as amended*, at 3-4 (1996) ("MPPAA's imposition of withdrawal liability on employers that leave underfunded plans has encouraged employers to remain as contributing sponsors, provided an incentive to get plans funded, and increased the funding of plans with departing sponsors."). Collection of withdrawal liability, however, continues to be a major concern for many multiemployer plans that are *not* fully funded. The total underfunding of such plans is estimated at $14 billion.

Id. at 4. And for those underfunded plans, the recent and conflicting appellate decisions discussed above demonstrate that the statute of limitations issue is of recurring importance.

b. Contrary to respondents' assertion (Br. in Opp. 8), resolution of the circuit conflict would affect the outcome of the current case. Under the Ninth Circuit's decision, petitioner's complaint (filed on February 9, 1993) is untimely because it was filed more than six years after the employer's complete withdrawal in March 1985. Similarly, under the view taken by the Seventh Circuit in *Navco* and the district court below, petitioner's action is time-barred because it was filed more than six years after the date on which the employer first missed a payment, February 1, 1987. By contrast, under the view taken by the Third Circuit in *Kahle*, although petitioner's suit to collect the employer's February 1, 1987 payment may be time-barred, petitioner's action is timely with respect to installments due but unpaid thereafter.

3. a. On the merits of the limitations issue, the decision of the court of appeals in this case is incorrect.

MPPAA authorizes a plan fiduciary to bring an action to collect withdrawal liability whenever the plan is "adversely affected by the act or omission of any party under [the withdrawal liability provisions of Title IV of ERISA]." 29 U.S.C. 1451(a). The "act or omission" that adversely affects a plan is the employer's failure to pay its withdrawal liability as required by the Act.

"Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action." *Joyce*, 871 F.2d at 1123. That is so because an employer does not owe any withdrawal liability on the date of its withdrawal from the plan. See *Schlitz*, 115 S. Ct. at 988 ("[T]he statute makes clear that the withdrawing employer owes nothing until its plan demands payment.").

MPPAA provides that "[a]s soon as practicable" following a withdrawal, the plan sponsor must establish a schedule of payments in accordance with the Act. 29 U.S.C. 1399(b)(1). The first payment is not due until as much as 60 days after the plan sponsor sets that schedule. 29 U.S.C. 1399(c)(2); see 29 U.S.C. 1399(c)(1)(A)(i) ("Actual payment shall commence in accordance with paragraph (2)."). Thus, "MPPAA contemplates that an employer sometimes may pay its actual first installment long after the withdrawal year." *Schlitz*, 115 S. Ct. at 990. Accordingly, not until an employer fails to pay its withdrawal liability when due is a plan sponsor "adversely affected" by an "act or omission" of the withdrawing employer, 29 U.S.C. 1451(a), and it is only then that the plan sponsor has a cause of action to collect withdrawal liability payments.

Under the Ninth Circuit's decision, the statute of limitations always begins to run before a plan sponsor is entitled to file suit. The Ninth Circuit's decision is therefore inconsistent with the principle that "the statute of limitations will [not] be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602 (1887). See also *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute."); *United States* v. *Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued.").

Indeed, a rule that the statute of limitations begins on the date of an employer's withdrawal would significantly curtail the ability of plan sponsors to collect withdrawal liability. The Ninth Circuit's decision effectively prevents plan sponsors from collecting any unpaid installment payments that may become due more than six years after the date of the employer's withdrawal. That result cannot be reconciled with the Act, which expressly provides for a payment schedule that may extend as long as 20 years. See 29 U.S.C. 1399(c)(1). Congress could not have intended an employer that has a 20-year payment schedule to avoid the bulk of its liability by making timely payments for six years after it withdraws, and then refusing to make any further payments on the ground that the statute of limitations has already expired.[6]

b. In our view, petitioner's complaint is not time-barred to the extent it seeks payments from the employer that became overdue on or after a date six years prior to the filing of the complaint. Cf. Compl. ¶¶ 26, 27 (seeking the entire amount of withdrawal liability or, alternatively, the amount of the delinquent monthly payments owed between February 1987 and the time of trial). Petitioner filed its complaint on February 9, 1993, more than six years following the employer's first missed payment on February 1, 1987, but less than six years following the employer's next scheduled payment. Thus, petitioner has

---

[6] The Ninth Circuit's holding that petitioner's claim arose on the date of the employer's withdrawal also is difficult to reconcile with this Court's decision in *Schlitz*, *supra*. There, the pension plan argued that an employer's withdrawal liability payment schedule included interest for the year in which withdrawal occurred. In rejecting that contention, the Court observed that the "withdrawing employer's debt does not arise" at that time, because "the statute makes clear that the withdrawing employer owes nothing until its plan demands payment." 115 S. Ct. at 988.

timely sued to collect the employer's unpaid scheduled payments due within the six years prior to February 9, 1993.

The fact that petitioner did not file suit within six years after the employer's first missed payment on February 1, 1987 should not bar petitioner's suit to collect the remaining missed payments. The view taken by the Seventh Circuit—that a fund has "only one *claim* against the employer," *Navco*, 3 F.3d at 172—is based on an incorrect reading of the Act.

The court in *Navco* concluded that although MPPAA "permit[s] an employer to amortize [its withdrawal liability] over 20 years, the whole amount is presumptively due at the outset." *Navco*, 3 F.3d at 172 (citation omitted). The Act, however, compels the opposite conclusion. Although MPPAA permits an employer to prepay all or a portion of its withdrawal liability, 29 U.S.C. 1399(c)(4), MPPAA first requires the plan sponsor to demand payments in accordance with a schedule that amortizes the debt in level payments pursuant to a statutorily prescribed formula. 29 U.S.C. 1399(c)(1)-(3). Absent default by the employer, 29 U.S.C. 1399(c)(5); 29 C.F.R. 4219.31(b)-(c), the plan sponsor can neither demand payment for the entire outstanding amount of the employer's withdrawal liability nor bring a collection suit under the Act for the full amount. Moreover, even upon the employer's default, the outstanding amount of the withdrawal liability is not "presumptively due" (*Navco*, 3 F.3d at 172), because 29 U.S.C. 1399(c)(5) places the decision whether to accelerate some or all of the outstanding liability within the discretion of the plan sponsor. For those reasons, unless a plan sponsor has accelerated payment of the employer's entire liability following the employer's default, the plan sponsor's cause of action to collect an overdue payment, see

29 U.S.C. 1401(b)(1), 1451(a), arises each time an employer misses a scheduled payment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1997

Supreme Court, U.S.
FILED
JUL 16 1997
CLERK

No. 96-370

In The Supreme Court of the United States

October Term, 1996

Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund,
Petitioner,

v.

Ferbar Corporation of California, Inc.; Stephen Barnes,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 10, 1996
CERTIORARI GRANTED MAY 12, 1997

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NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

Order of the United States District Court for Northern California [Filed May 9, 1994]	6a
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Order Denying Rehearing and Rejecting Suggestion for Rehearing En Banc	20a

RELEVANT DOCKET ENTRIES

United States District Court
for the Northern District of California
Docket No. 93-CV-489

DATE	NO.	PROCEEDINGS
2/9/93	1	COMPLAINT (Summons(es) issued) Fee status pd entered on 2/9/93 in the amount of $120.00 (Receipt No. 27318) (fw) [Entry date 02/10/93]
3/23/93	3	ANSWER by defendant Ferbar Corp of CA, defendant Stephen J. Barnes to complaint [1-1] (fw) [Entry date 03/26/93]
10/27/93	10	NOTICE AND MOTION before Judge D. L. Jensen by defendant Ferbar Corp of CA, defendant Stephen J. Barnes for summary judgment with Notice set for 11/24/93 at 10:00 am (fw) [Entry date 10/28/93]
10/27/93	11	MEMORANDUM by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
10/27/93	12	STATEMENT of undisputed material facts by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
10/27/93	13	DECLARATION by Stephen J. Barnes on behalf of defendant Ferbar Corp of CA, defendant Stephen J. Barnes re motion for summary judgment [10-1] (fw) [Entry date 10/28/93]
11/10/93	14	NOTICE AND CROSS-MOTION before Judge D. L. Jensen by plaintiff Bay Area Laundry& Dry for summary adjudication with Notice set for 11/24/93 at 10:00am [3:93-cv-00489] (fw) [Entry date 11/12/93]

DATE	NO.	PROCEEDINGS
11/10/93	15	MEMORANDUM by plaintiff Bay Area Laundry&Dry in opposition to motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	15	MEMORANDUM by plaintiff Bay Area Laundry&Dry in support of motion for summary adjudication [14-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	16	DECLARATION by Geoffrey V. White on behalf of plaintiff Bay Area Laundry&Dry re motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/10/93	17	STATEMENT of facts by plaintiff Bay Area Laundry&Dry in support of memorandum [15-1] [3:93-cv-00489] (fw) [Entry date 11/12/93]
11/17/93	18	REPLY by defendant Ferbar Corp of CA, defendant Stephen J. Barnes re motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 11/22/93]
12/22/93	20	MEMORANDUM by defendant Ferbar Corp of CA, defendant Stephen J. Barnes in support of motion for summary judgment [10-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]
12/22/93	21	MEMORANDUM by plaintiff Bay Area Laundry&Dry in support of motion for summary adjudication [14-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]
12/22/93	22	SUPPLEMENTAL DECLARATION by Geoffrey V. White on behalf of plaintiff Bay Area Laundry&Dry re memorandum [21-1] [3:93-cv-00489] (fw) [Entry date 12/23/93]

DATE	NO.	PROCEEDINGS
5/9/94	25	ORDER by Judge D. L. Jensen granting defendants Ferbar Corporation and Stephen Barnes motion for summary judgment [10-1]; Partial judgment shall be entered accordingly. Status conference set for 8:30 5/25/94 ; All other dates currently scheduled are vacated. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
5/9/94	26	PARTIAL JUDGMENT: by Judge D. L. Jensen For reasons in Order filed 5/9/94, Court ENTERS PARTIAL JUDGMENT in favor of defendant Ferbar Corporation and against plaintiffs in this matter. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
5/9/94	27	PARTIAL JUDGMENT: by Judge D. L. Jensen For reasons stated in Order filed 5/9/94, Court ENTERS PARTIAL JUDGMENT in favor of defendant Stephen Barnes and against plaintiffs in this matter. (Date Entered: 5/11/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 05/11/94]
6/3/94	29	ORDER by Judge D. L. Jensen dismissing party Robert J. Ferreira, party Diablo Cleaners, Inc, party Ferreira Farms, Inc. with prejudice , dismissing case (see Partial Summary Judgment re defendants Stephen Barnes and Ferbar Corporation- 5/9/94) (Date Entered: 6/6/94) (cc: all counsel) [3:93-cv-00489] (fw) [Entry date 06/06/94]
6/6/94	30	NOTICE OF APPEAL by plaintiff Bay Area Laundry&Dry from Dist. Court decision judgment [27-1], judgment [26-1] PAID 109826 [3:93-cv-00489] (fw)

United States Court of Appeals
for the Ninth Circuit
Docket No. 94-15976

DATE	PROCEEDINGS
6/9/94	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : yes. setting schedule as follows: CADS due 6/23/94 for Geoffrey White; appellant's designation of RT is due 6/16/94; appellee's designation of RT is due 6/27/94, , ; appellant shall order transcript by 7/6/94; court reporter shall file transcript in DC by 8/8/94 for Judith Dudeck; certificate of record shall be filed by 8/15/94 ; appellant's opening brief is due 9/22/94; appellees' brief is due 10/24/94, , ; appellants' reply brief is due 11/7/94; [94-15976] (vt)
11/16/95	ARGUED AND SUBMITTED TO William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT [94-15976] (mlm)
1/17/96	FILED PER CURIAM OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Unsigned, Published. William A. NORRIS, author; Robert R. BEEZER; Stephen S. TROTT, concurring.) FILED AND ENTERED JUDGMENT. [94-15976] (ot)
1/30/96	Filed original and 40 copies Appellant Bay Area Laundry petition for rehearing with suggestion for en banc 06 p.pages, served on 1/30/96 (PNL/ ACTIVE JDGS) [94-15976] (ot)
2/12/96	Filed order (William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT.) : Aple is directed to file a response to aplt's suggestion for rehearing en banc filed with this court on 1/30/96. In its response, aple should address aplt's argument that the decision in this case directly conflicts with the law of three other circuits. The response shall

DATE	PROCEEDINGS
	not exceed 15 pages, and shall be filed within 14 days of the date of this order. (phoned counsel) [94-15976] (em)
2/23/96	Filed Appellee Ferbar Corporation's response to petition rehearing and for suggestion for enbanc rehearing, served on 2/23/96 (PANEL & ACTIVE JDGES) [94-15976] (ot)
5/13/96	Filed order (William A. NORRIS, Robert R. BEEZER, Stephen S. TROTT) : denying petition for rhrg and the suggestion for enbanc rehearing is rejected. [94-15976] (ot)
5/13/96	MANDATE ISSUED [94-15976] (mlm)

[Filed Feb. 9, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 93 0489 DLJ

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Plaintiffs,

v.

FERBAR CORPORATION OF CALIFORNIA, INC., A California corporation; FERREIRA FARMS, INC., A California corporation; DIABLO CLEANERS, INC., A California corporation; STEPHEN J. BARNES, and ROBERT J. FERREIRA,
Defendants.

COMPLAINT FOR COLLECTION OF EMPLOYER WITHDRAWAL LIABILITY PAYMENTS

[ERISA Section 4301]

Plaintiffs allege:

1. This is an action by the Trustees of an employee pension benefit plan to collect withdrawal liability payments from an employer which has withdrawn from the Plan.

JURISDICTION

2. The jurisdiction of this Court is founded on Sections 4301 and 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") [29 U.S.C. Sections 1451, 1145].

3. This action arises under Sections 4219(c), 4221(b)(1) and 502(g)(2) of ERISA [29 U.S.C. Sec-

tions 1399(c), 1401(b)(1), and 1132(g)(2)] for violations of Section 515 of ERISA [29 U.S.C. Section 1145]

VENUE

4. Venue is proper under Section 4301(d) of ERISA [29 U.S.C. Section 1451(d)]. The BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND is administered in the Northern District of California. Defendants have their principal place of business in the Northern District of California.

PLAINTIFF

5. At all times herein mentioned, the BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND ("FUND") was and is an employee pension benefit plan within the meaning of Section 3(2) of ERISA [29 U.S.C. Section 1002(2)] established and maintained pursuant to several collective bargaining agreements between various employers engaged in commerce and AFL-CIO Laundry, Dry Cleaning, Government and Industrial Service Union Local 3 ("UNION"), an employee organization representing employees engaged in commerce, for the purpose of providing pension and related benefits to participants in the Fund and thier beneficiaries. The Fund is a multiemployer plan as defined in Sections 3(37) and 4001(a)(3) of ERISA [29 U.S.C. Sections 1002(37), 1301(a)(3)] and subject to and bound by the terms and provisions of ERISA, as provided in Section 4 thereof [29 U.S.C. Section 1003(a)]. The Board of Trustees of the Fund are the named fiduciaries of the Fund, and are authorized pursuant to Sections 4301(a)(1) and 502(g)(2) of ERISA [29 U.S.C. Sections 1451(a)(1) and 1132(g)(2)] to bring this action. The Fund, and the Pension Plan maintained thereunder, were established pursuant to an Agreement and Declaration of Trust as amended and restated effective July 1, 1974.

DEFENDANTS

6. Defendant FERBAR CORPORATION OF CALIFORNIA, INC. ("FERBAR") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Oakland, California.

7. Defendant FERREIRA FARMS, INC. ("FARMS") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Oakland. California.

8. Defendant DIABLO CLEANERS, INC. ("DIABLO") is, and at all times herein mentioned was a California corporation, engaged in the dry cleaning business, with its principal place of business in Walnut Creek, California.

9. Defendant STEPHEN J. BARNES is, and at all times herein mentioned was a shareholder, officer and employee of Defendant FERBAR.

10. Defendant ROBERT J. FERREIRA is, and at all times herein mentioned was a shareholder, officer and employee of Defendant FERBAR, FARMS, and DIABLO, and each of them.

FIRST CLAIM

11. At all times material hereto, Defendant FERBAR was party to a collective bargaining agreement with the UNION which obligated FERBAR to contribute to the FUND on behalf of its covered employees.

12. On or about March, 1985, Defendant FERBAR completely withdrew as a contributing employer to the Fund by ceasing to have an obligation to contribute to the FUND pursuant to collective bargaining with the UNION.

13. By virtue of Defendant FERBAR's complete withdrawal from the Fund, Defendants FERBAR, FARMS, and DIABLO, and each of them, became liable to the

Fund for its withdrawal liability payments as determined in accordance with Section 4201 of ERISA [29 U.S.C. Section 1381].

14. On or about December 12, 1986, the Fund assessed a withdrawal liability against Defendant FERBAR in the amount of $45,570.80, and demanded payment in monthly installments of $345.50 for 240 months, plus a final payment of $344.96. Said notice and demand for payment of withdrawal liability fully conformed to applicable law and plan provisions. In accordance with Section 4219(c)(2) of ERISA [29 U.S.C. Section 1399(c)(2)], Defendant FERBAR was obligated to commence payment of its assessed withdrawal liability no later than February 1, 1987.

15. Defendant FERBAR requested review and arbitration of its withdrawal liability. No arbitration proceedings have been initiated pursuant to Section 4221 of ERISA [29 U.S.C. Section 1401].

16. At all times subsequent to February, 1987, Defendants FERBAR, FARMS, and DIABLO, and each of them, have failed and refused, and continue to fail and refuse to make the required installment payments of its withdrawal liability, or any of them, or to make a lump sum total payment thereof.

17. Defendant FERBAR has failed to cure its delinquency in payment of withdrawal liability and has defaulted in payment of such obligation. In accordance with Section 4219(c)(5) and 4221(d) of ERISA [29 U.S.C. Sections 1399(c)(5), 1401(d)], the total amount of outstanding withdrawal liability is now due and owing from Defendants in the sum of approimately $45,570.80, together with interest at the rate specified in ERISA Section 4219(c)(6) [29 U.S.C. Section 1399(c)(6)].

18. Plaintiffs have been required to retain the services of legal counsel to enforce payment of the amounts due and owing from Defendants and have incurred and will

incur reasonable attorneys' fees in amounts not yet ascertained.

SECOND CLAIM

19. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

20. Defendants, and each of them, constitute a group of businesses under common control and a single Employer within the meaning of Title IV of ERISA [29 U.S.C. Section 1301 *et seq.*]

21. By virtue of the facts set forth above, Defendants, and each of them, are jointly and severally liable for the amount of employer withdrawal liability assessed against FERBAR.

THIRD CLAIM

22. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

23. Defendant FERBAR is and at all times mentioned has been, the alter ego of, and a mere shell, instrumentality and conduit of Defendants BARNES and FERREIRA, in that said individual defendants transferred assets and liabilities to and from the corporation without adequate consideration and otherwise failed to maintain sufficient respect for the separate identity of FERBAR.

24. By virtue of the facts set forth above Defendant BARNES and FERREIRA are jointly and severally liable for the amount of employer withdrawal liability assessed against FERBAR.

FOURTH CLAIM

25. Plaintiffs reallege and replead the allegations contained in Paragraphs 1 through 18, inclusive.

26. By reason of the foregoing, there is now due, owing and unpaid from Defendants to Plaintiffs the sum of approimately $25,375, being the amount of the de-

linquent monthly installment payments from February, 1987 to the date of filing of this action, and the sum of $345.50 each month thereafter. Plaintiffs will seek leave to amend this Complaint prior to trial to set forth the amount remaining unpaid.

27. Plaintiffs have suffered and will continue to suffer irreparable harm and injury unless Defendant FERBAR is preliminarily and permanently enjoined and required by Order of this Court to comply with its obligations under ERISA to make payments of its withdrawal liability as demanded by the FUND. Plaintiffs have suffered the loss of, and continue to lose investment income upon the monies owed by Defendants, adversely affecting the actuarial stability of the FUND and its ability to continue to pay benefits to participants. As all remaining contributing employers have withdrawn from the Plan, the Plan's only source of income presently is withdrawal liability payments. Unless Defendants are compelled to make installment payments as demanded, higher funding costs will be imposed on other withdrawn employers and the FUND will soon be insolvent.

28. Plaintiffs have no plain, speedy or adequate remedy at law and will be compelled to file a multiplicity of actions unless injunctive relief is granted herein.

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

On the First, Second and Third Claims:

1. For unpaid withdrawal liability payments in the sum of approimately $45,570.80;

On the Fourth Claim:

2. For the sum of $25,375, and for such further sum as may be proved due, owing and unpaid at the time of trial;

3. For a preliminary and permanent injunction requiring Defendants to pay the FUND each and every monthly withdrawal liability payment in the sum of $345.

On All Claims:

4. For interest on said unpaid withdrawal liability payments from the date due until actually paid, at the rate prescribed under ERISA Section 4219(C)(6) [29 U.S.C. Section 1399(c)(6)];

5. For liquidated damages in an amount equal to said interest on unpaid withdrawal liability;

6. For reasonable attorneys' fees and costs in this action; and

7. For such other and further relief as the Court deems just and proper.

Dated: February 9, 1993

LAW OFFICES OF GEOFFREY V. WHITE

/s/ Geoffrey V. White
GEOFFREY V. WHITE
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

ANSWER TO COMPLAINT OF DEFENDANTS FERBAR CORPORATION OF CALIFORNIA INC. AND STEPHEN J. BARNES

COME NOW Defendants Ferbar Corporation of California, Inc. and Stephen J. Barnes (hereinafter sometimes referred to as "Defendants") and answer the Complaint on file herein.

1. ANSWERING PARAGRAPHS 1, 2, 3 AND 4 OF THE COMPLAINT, Defendants admit the allegations contained therein.

2. ANSWERING PARAGRAPHS 5, 7, 8 AND 10 OF THE COMPLAINT, Defendants lack sufficient information and belief to answer the allegations contained therein, and based on said lack of information and belief Defendants deny the allegations contained therein.

3. ANSWERING PARAGRAPH 6 OF THE COMPLAINT, Defendants deny the allegations contained therein. Defendants admit that Defendant Ferbar Corporation ("Ferbar") was and is a California corporation, and at one time was engaged in the dry cleaning business with its principal place of business in Oakland, but deny that it is currently engaged in the dry cleaning business or that its principal place of business is located in Oakland, California.

4. ANSWERING PARAGRAPH 9 OF THE COMPLAINT, Defendants admit that Stephen J. Barnes was

and is a shareholder and officer of Defendant Ferbar Corporation of California, Inc. and admit that he was an employee of Defendant Ferbar Corporation, but denies that he is an employee of Defendant Ferbar.

5. ANSWERING PARAGRAPHS 11, 12, 13 AND 17 OF THE COMPLAINT, Defendants deny each and every of the the allegations contained therein.

6. ANSWERING PARAGRAPH 14 OF THE COMPLAINT, Defendants deny each and every of the allegations contained therein. Defendants allege that on or about December 12, 1986 the Fund assessed a withdrawal liability against Superior French Laundry in the amount of $45,570.80, and that the Fund directed Superior French Laundry to commence payment of its assessed withdrawal liability no later than February 1, 1987.

7. ANSWERING PARAGRAPH 15 OF THE COMPLAINT, Defendants deny that Defendant Ferbar requested review and arbitration of its withdrawal liability, but allege that Superior French Laundry requested a review and arbitration of its assessed withdrawal liability. Defendants deny the allegation that no arbitration proceedings have been initiated pursuant to section 4221 of ERISA, and alleges that Superior French Laundry timely and properly initiated arbitration proceedings pursuant to section 4221 of ERISA.

8. ANSWERING PARAGRAPH 16 OF THE COMPLAINT, Defendants deny generally and singularly, each and every of the allegations contained therein. Defendants affirmatively admit that they failed and continued to fail to pay the February 1, 1987 and subsequent installment payments and to make a lump sum total payment.

9. ANSWERING PARAGRAPH 18 OF THE COMPLAINT, Defendants lack sufficient information and belief to answer the allegation contained therein and based

on said lack of information and belief, Defendants deny the allegations contained therein.

10. ANSWERING PARAGRAPH 19 OF THE COMPLAINT, Defendants incorporate by reference their answers to Paragraphs 1 through 18, inclusive.

11. ANSWERING PARAGRAPHS 20 AND 21 OF THE COMPLAINT, Defendants deny each and every allegation contained therein.

12. ANSWERING PARAGRAPH 22 OF THE COMPLAINT, Defendants incorporated by reference their answers to Paragraphs 1 through 18, inclusive.

13. ANSWERING PARAGRAPHS 23 AND 24 OF THE COMPLAINT, Defendants deny each and every allegation contained therein.

14. ANSWERING PARAGRAPH 25 OF THE COMPLAINT, Defendants incorporate by reference their answers to Paragraphs 1 through 18, inclusive.

15. ANSWERING PARAGRAPHS 26, 27 AND 28 OF THE COMPLAINT, Defendants deny and every allegation contained therein.

AFFIRMATIVE DEFENSES

1. AS THEIR FIRST AFFIRMATIVE DEFENSE, Defendants allege that the Complaint and each claim for relief fails to state facts sufficient to constitute a claim for relief.

2. AS THEIR SECOND AFFIRMATIVE DEFENSE, Defendants allege that this action was filed in excess of the statute of limitations period set forth in 29 U.S.C. § 1451(f).

3. AS THEIR THIRD AFFIRMATIVE DEFENSE, Defendants allege that at no time did Defendants execute any written collective bargaining agreement with the

Laundry, Dry Cleaning, Government and Industrial Service Union Local 3, AFL-CIO.

4. AS THEIR FOURTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed to exhaust its administrative remedies.

5. AS THEIR FIFTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed and refused to participate in timely initiated arbitration proceedings related to any withdrawal liability in this matter.

6. AS THEIR SIXTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff failed to file this action as soon as it was practicable for it to do so.

7. AS THEIR SEVENTH AFFIRMATIVE DEFENSE, Defendants allege that any contributions made by Superior French Laundry or any Defendants were not required, and that they were not made under a collective bargaining agreement or as a result of a duty under applicable labor-management relations law.

8. AS THEIR EIGHTH AFFIRMATIVE DEFENSE, Defendants allege that any contributions made by Superior French Laundry or any Defendants to the Fund should not have been utilized in making a determination of withdrawal liability and no such liability should have been assessed.

9. AS THEIR NINTH AFFIRMATIVE DEFENSE, Defendants allege that the Fund was inaccurate in the manner in which it calculated the withdrawal liability, and that the Fund did not follow the steps set forth in the statute for the second alternative method of calculating withdrawal liability.

10. AS THEIR TENTH AFFIRMATIVE DEFENSE, Defendants allege that the amount of withdrawal liability was improperly calculated.

11. AS THEIR ELEVENTH AFFIRMATIVE DEFENSE, Defendants allege that the Fund did not utilize the proper statutory and regulatory method in calculating withdrawal liability following the merger of the Dry Cleaners and Laundry Workers Pension Trust Fund.

12. AS THEIR TWELFTH AFFIRMATIVE DEFENSE, Defendants allege that the improper purpose and effect of the merger of the Dry Cleaners and Laundry Workers Pension Trust Funds was to increase the unfunded vested benefits and concomitant withdrawal liability of employers in the Dry Cleaners Pension Fund.

13. AS THEIR THIRTEENTH AFFIRMATIVE DEFENSE, Defendants allege that the assumptions, actuarial and other information used in determining the unfunded and vested benefits and calculating the withdrawal liability was incorrect.

14. AS THEIR FOURTEENTH AFFIRMATIVE DEFENSE, Defendants allege that Plaintiff did not follow the prescribed default and acceleration procedure.

WHEREFORE Defendants pray that:

1. Plaintiffs take nothing by this action.

2. Judgment be entered in favor of Defendants.

3. The Complaint be dismissed against Defendants.

4. Defendants be awarded their reasonable attorneys' fees.

5. Defendants be awarded their costs of suit herein.

6. The Court grant whatever further relief it deems just and proper.

DATED: March 23, 1993

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF,
TICHY & MATHIASON
A Professional Corporation

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
Attorneys for Defendants
FERBAR CORPORATION OF
CALIFORNIA, INC. and
STEPHEN J. BARNES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Date: November 24, 1993

Defendant/Moving Parties' Alleged Undisputed Facts	*Supporting Evidence*
1. Ferbar Corporation owned three facilities: Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	Decl. of Stephen J. Barnes, p. 1:24-26.
2. Contributions were made by Ferbar to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities —Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	Decl. of Stephen J. Barnes, p. 1:26—p. 2:2.
3. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983.	Decl. of Stephen J. Barnes, p. 2:3-5.
4. On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government and Industrial Services Local No. 3.	Decl. of Stephen J. Barnes, p. 2:6-9.

Defendant/Moving Parties' Alleged Undisputed Facts	*Supporting Evidence*
5. Ferbar Corporation made no contributions to the Pension Trust Fund on behalf of employees working at Superior French Laundry or One Hour Martinizing commencing in March 1985 and thereafter.	Decl. of Stephen J. Barnes, p. 2:10-13.
6. Bay Area Laundry and Dry Cleaning Pension Fund sent a letter to Superior French Laundry dated December 12, 1986 establishing a monthly payment schedule for Superior French's withdrawal liability and notifying it that Superior French's first monthly withdrawal liability payment was due on February 1, 1987.	Decl. of Stephen J. Barnes, p. 2:16-21; Exh. A to Decl. of Stephen J. Barnes; Complaint, ¶ 14.
7. Neither Ferbar Corporation nor Superior French Laundry made any withdrawal liability payment to Bay Area Laundry and Dry Cleaning Pension Fund on or by February 1, 1987.	Decl. of Stephen J. Barnes, p. 3:1-3.
8. The Complaint in this action was filed on February 9, 1993.	Complaint on file with the Court.

DATED: October 19, 1993

Respectfully submitted,

LITTLER, MENDELSON, FASTIFF, TICHY & MATHIASON
A Professional Corporation

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
Attorneys for Defendants
FERBAR CORPORATION OF CALIFORNIA, INC. and
STEPHEN J. BARNES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DECLARATION OF STEPHEN J. BARNES

Date: November 24, 1993

I, STEPHEN J. BARNES, declare that this declaration is given in support of Defendants' Motion For Summary Judgment, and that if I were called upon to testify, I could of my own knowledge testify to the following:

1. I am a shareholder in Defendant Ferbar Corporation. At one time, Ferbar made contributions to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities. Those facilities were Superior French Laundry, One Hour Martinizing and Diablo Cleaners.

2. In 1983, Ferbar ceased making contributions on behalf of employees working at Diablo Cleaners, as Diablo was no longer owned by Ferbar at that point.

3. On March 1, 1985, employees working at Superior French Laundry and One Hour Martinizing submitted a petition to me indicating that they no longer wanted to be represented by AFL-CIO Laundry Dry Cleaning, Government and Industrial Services Local No. 3. After receipt of that petition, Ferbar ceased to make contributions to the Pension Trust Fund on behalf of employees of Superior French Laundry and One Hour Martinizing commencing in March, 1985, and made no contributions thereafter. If Ferbar had any obligation to

contribute to the Pension Trust Fund, it no longer existed starting in March 1985.

4. By letter dated December 12, 1986, Plaintiff Trust Fund sent notice to Superior French Laundry that it had a withdrawal liability obligation to the Pension Fund, and established a monthly payment schedule for it with the first payment due on February 1, 1987. A copy of said notice which I received is attached hereto marked Exhibit A.

5. Neither Ferbar nor Superior French Laundry made any withdrawal liability payments to the Pension Fund on or by February 1, 1987 or at any time thereafter.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Carlos, California on October 15, 1993.

/s/ Stephen J. Barnes
STEPHEN J. BARNES

[EXHIBIT A]

BAY AREA LAUNDRY AND DRY CLEANING PENSION FUND
Glen Slaughter & Associates, Administrator
1999 Harrison Street, Suite 500
Oakland, California 94612
Telephone (415) 451-8564

December 12, 1986

- Superior French Laundry
- Stephen Barnes
- 1284 W Grand Ave
- Oakland, CA 94607

RE: *Withdrawal Liability Assessment and Demand for Payment*
Account Number(s): 0912270

Gentlemen:

Our records indicate that you have not contributed to the Bay Area Laundry and Dry Cleaning Pension Fund since March 1985.

Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 ("ERISA").

This statute, as you probably know, provides that when an employer withdraws from participation in a multiemployer pension plan, the withdrawing employer is obligated to the Plan for a portion of the Plan's unfunded vested benefit liabilities as of the end of the Plan Year immediately preceding the date of the employer's withdrawal.

Pursuant to the provisions of this statute and to the implementing regulations promulgated by the Pension Benefit Guaranty Corporation, the Board of Trustees in the Plan have adopted certain methods of calculating the withdrawal liabilities applicable to you. These calculations are summarized on the attached forms and indicate a lump sum withdrawal liability assessment amount of $45,570.80.

You may pay the withdrawal liability set forth in the preceding paragraph by a single lump sum payment within 60 days after your receipt of this letter.

The Act also permits a schedule of payments as an option to the lump sum payment. Under the optional schedule, your first payment of $345.50 for 240 months is due on February 1, 1987, with a final payment of $344.96. Payments are due on the first of each month.

The attached worksheet and exhibit illustrate the calculation of both the lump sum payment and optional schedule.

Should you fail to make your first monthly payment by its due date, or should you fail to make any subsequent monthly payments when due, ERISA, as amended, provides that you will incur interest charges from the date your payment becomes due until the date payment is finally received.

Additionally, you may incur liability for liquidated damages and other sums assessed under the delinquency provisions of the Plan's Trust Agreement; and, your obligation may be subject to such additional steps as the Trustees may require in accordance with the law.

More importantly, should you fail to pay any monthly payment plus interest within 60 days after receiving written notice from the Plan that such payment is delinquent, or should you commit any other act which the Plan deems to constitute a "default" in your payment obligations, ERISA, as amended, provides that the Board of Trustees may deem you to be in default and thereby liable for immediate payment of the outstanding amount of your withdrawal liability from the due date of the first payment which was not timely made. If the Plan has to sue to collect withdrawal liability, the Act requires the Court to award to the Plan its costs, attorneys fees, interest and liquidated damages.

Within ninety (90) days from the date you receive this notice, you may:

(1) Request the Trustees to review any specific matter relating to the determination of your company's liability and payment schedule;

(2) Identify to the Trustees any claimed inaccuracy; and

(3) Furnish the Trustees with any additional relevant information.

The Plan will review any matter raised by you, and you will subsequently be notified of the Plan's decision, the basis for the decision, and the reason for any change in the determination of your liability or your schedule to liability payments. *You are required by the Act to make the payments set forth in this letter notwithstanding any request for review or appeal of the determination of the amount of your liability or the schedule of payments.* Any adjustments to your liability will be reflected in your future payments.

This letter is intended to provide you with notice of your liability and payment obligations and of the existence of ERISA, as amended, and of some of its provisions. This letter is not intended as an explanation of the statute, nor shall it be construed as limiting in any way the rights of the Plan under the statute.

Sincerely,

BOARD OF TRUSTEES

Encl.: Withdrawal Liability Calculations

cc: All Trustees
Legal Counsel
Actuary

[Filed Nov. 10, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

DECLARATION OF GEOFFREY V. WHITE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFFS CROSS-MOTION FOR SUMMARY ADJUDICATION

Date: November 24, 1993

I, GEOFFREY V. WHITE, declare as follows:

1. I am the attorney for Plaintiffs, BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, in the above-captioned matter. I have been the attorney for the Trust Fund since 1975. I make this Declaration in support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment herein, and for Plaintiffs' Cross-Motion for Summary Adjudication of Defendants' claim the Complaint is barred by the applicable statute of limitations under ERISA.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Withdrawal Liability Assessment and Demand for Payment, dated December 12, 1986 from the Fund addressed to Superior French Laundry and Defendants Stephen J. Barnes. That notice informed Defendants that they had withdrawn from the Fund by ceasing to make contributions on and after March, 1985, that the Fund had calculated Defendants' withdrawal liability in the sum

of $45,570.80, and that Defendants could either pay the withdrawal liability in a single lump sum payment within sixty (60) days after receipt of that demand, or pay the withdrawal liability in monthly payments commencing February 1, 1987. Further, the Assessment informed Defendants that failure to pay any installment by the due date would incur liability for interest and liquidated damages, and any subsequent failure to pay within sixty (60) days after receiving written notice that such payment was delinquent would constitute a default in accordance with ERISA and the regulations promulgated by the Pension Benefit Guaranty Corporation.

3. On or about February 27, 1987, Superior French Laundry submitted its Request for Review of the withdrawal liability assessment. Attached hereto as Exhibit 2 is a true and correct copy of that letter. As indicated in the Request for Review, the Employer challenged the Fund's calculations of its withdrawal liability and denied that it had any obligation to contribute to the Fund, even though it had done so for many years, because it had allegedly never signed a collective bargaining agreement.

4. On or about April 14, 1987, the Fund mailed to Superior French Laundry a Notice of Delinquency in payment of its withdrawal liability assessment. A true and correct copy of that letter is attached hereto as Exhibit 3. As stated in the Notice of Delinquency,

> That letter [the withdrawal liability Assessment] informed you of your monetary obligations as a Withdrawn Employer under ERISA and provided you with two options for payment: (1) payment of the entire lump sum within sixty (60) days or, (2) Payment of the first installment on a series of payments within sixty (60) days.

The letter continued by stating that since more than sixty days had elapsed without any payment from the Em-

ployer, it was now considered delinquent, and would be considered in default of its obligations to pay withdrawal liability unless the delinquency was cured within sixty days of the date of the Notice of Delinquency.

5. On or about July 8, 1987, Superior French Laundry submitted its Notice of Initiation of Arbitration in response to the Fund's assessment of withdrawal liability. Attached hereto as Exhibit 4 is a true and correct copy of that Notice. Although the Employer provided this notice of its intent to proceed to arbitration of its disputed withdrawal liability, no arbitration proceedings have yet commenced. As indicated therein, a copy of the initial Assessment and demand for payment was attached thereto as Exhibit A, and a copy of the Employers Request for Review was attached as Exhibit B.

6. In accordance with the Multi-Employer Pension Plan Amendments Act, which amended ERISA to provide for calculation and payment of Employer withdrawal liability, the Fund Trustes adopted rules and regulations pertaining to employer withdrawal liability under the Pension Plan in October, 1981. These rules and regulations were subsequently amended on October 23, 1986. Attached hereto as Exhibit 5 is a true and correct copy of these rules and regulations as adopted by the Trustees. As stated in Section 5(b) of these Rules,

> Withdrawal liability shall be payable monthly, according to the schedule determined by the Trustees. Payment of withdrawal liability shall commence no later than sixty days after demand is made therefore by the Trustees.

As further stated in Section 5(b),

> Failure to make any payment when due causes the Employer to be additionally liable for interest, and the Employer will be considered in default if the failure to make payment is not cured within sixty

days after the Employer receives notice of its delinquency.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Declaration was executed on November 10, 1993 at San Francisco, California.

/s/ Geoffrey V. White
GEOFFREY V. WHITE

(Exhibit 1 Omitted)

[EXHIBIT 2]

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
Attorneys at Law
650 California Street, 20th Floor
San Francisco, California 94108-2693
(415) 433-1940

February 27, 1987

CERTIFIED/RETURN
RECEIPT REQUESTED

Board of Trustees
Bay Area Laundry and Drycleaning
Pension Fund
1999 Harrison Street, Suite 500
P.O. Box 24263

Oakland, California 94623-1263

Re: *Superior French Laundry/Account No. 0912270*

Dear Members of the Board:

Pursuant to section 4219 of the Multi-Employer Pension Plan Amendments Act, the Employer, Superior French Laundry, hereby submits this request for review of the withdrawal liability of which you gave notice by letter of December 12, 1986 which was received by the Employer on or about December 15, 1986.

The Employer wishes to have the Trustees review their determination of withdrawal liability as it believes no liability may be imposed on it for the reasons set forth herein. It also will identify to the Trustees what it believes to be are inaccuracies in the Trustees' calculation of the withdrawal liability.

Under the second alternative method authorized by the Act and which we believe was utilized by the Fund in

determining withdrawal liability, the Fund is to take into account the "total amount required to be contributed by the employer under the plan for the last five plan years ending before the withdrawal." MPPA Section 4211(c)(3)(B)(i).[1] Section 4212 defines "obligation to contribute" as "an obligation to contribute arising—(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions."

Although the Employer herein did make contributions to the Pension Fund, those contributions were not required in that they were not made under a collective bargaining agreement or as a result of a duty under applicable labor-management relations law. The Employer never signed any collective bargaining agreement with Laundry, Drycleaning and Industrial Service Local 3, AFL-CIO or with any other union local. Neither was any trust agreement ever signed by the Employer. Under 29 U.S.C. § 186(c)(5)(B), it is unlawful for an employer to pay or agree to pay money to a respresentative of his employees except where the detailed basis on which such payments are to be made is specified in a written agreement with the employer. Unless there is a written agreement upon which the requirement to contribute is based, the Fund would be in violation of 29 U.S.C. § 186 if it demanded and collected pension contributions. See *Moglia* v. *Geoghegan*, 403 F.2d 110 (2nd Cir. 1968), *cert. denied*, 349 U.S. 919 (1969). As the Employer here is not bound by any collective bargaining agreement and as no provision of labor-management relations law could re-

[1] If another method of calculation was used the Employer's position would be the same, as the other methods prescribed by Congress also utilize amounts that the Employer was obligated or required to contribute.

quire trust fund contributions in the absence of a writing,[2] the Employer was not required or obligated to make any contributions. Hence, any contributions made by it should not have been utilized in making a determination of withdrawal liability and no such liability should have been assessed.

Moreover, the Employer believes that the Fund was inaccurate in the manner in which it calculated the withdrawal liability in that the Fund did not follow the steps set forth in the statute for the second presumptive method. It does not appear that the value (as of the end of 1984) of all outstanding claims for withdrawal liability that can reasonably be expected to be collected from employers withdrawing before 1984 was subtracted from the amount of the plan's UVB's as of the end of 1984 as required under section 4211(c)(3). Section 4211 also requires utilization only of the total contributions for all employers during the last five plan years preceding the withdrawal. This amount is to be increased by employer contributions owed for earlier periods that were collected in those five years and decreased by amounts contributed by employers who withdrew under the law's withdrawal provisions during those five years. Under Step 2 of your summary of the withdrawal liability calculation you speak of total contributions of all employees adjusted for withdrawals before 1984. It appears that the Fund may have taken into account contributions of employers prior to 1980 and that it did not make the appropriate increases and decreases referred to in the section. If that was the case, the calculations should be completely revised.

Finally, the Employer does not believe that the Fund utilized the proper statutory or regulatory methods in calculating withdrawal liability following the merger of the

[2] We are not dealing with a situation where a contract has expired but an exmployer is required to continue making contributions because no impasse has been reached. Here there was never a written contract in the first place.

Drycleaners and the Laundry Workers Pension Trust Funds. It believes that the improper purpose and effect of the merger was to increase the unfunded vested benefits and concomitant withdrawal liability of employers in the dry cleaners pension fund. It does not believe that the assumptions, actuarial and other information used in determining the unfunded vested benefits and calculating the withdrawal liability was correct.

The Employer hereby requests that the Trustees review their determination of Superior French Laundry's withdrawal liability and withdraw their notice of withdrawal liability assessment. In the alternative, it specifically requests that the Fund provide it with a copy of its rules on withdrawal liability, a copy of the documents pertaining to the Pension Plan mergers and a detailed report of all calculations it made and the assumptions and information utilized in determining the unfunded vested benefits and the Employer's withdrawal liability.

Very truly yours,

/s/ William F. Terheyden
WILLIAM F. TERHEYDEN

WFT:gmd

bcc: Steve Barnes

[EXHIBIT 3]

BAY AREA LAUNDRY AND
DRY CLEANING PENSION FUND
Glen Slaughter & Associates, Administrator
1999 Harrison Street, Suite 500
Oakland, California 94612
Telephone (415) 451-8564

April 14, 1987

- Superior French Laundry
- Stephen Barnes
- 1284 W. Grand Avenue
  Oakland, CA 94607

RE: Withdrawal Liability Assessment and Demand for Payment Account Number(s):

Gentlemen:

You have received a Withdrawal Liability Assessment letter from this office under date of December 12, 1986.

That letter informed you of your monetary obligations as a Withdrawn Employer under ERISA and provided you with two options for payment: (1) Payment of the entire lump sum within 60 days or, (2) Payment of the first installment on a series of payments within 60 days.

Since more than 60 days has elapsed from the date of the Withdrawal Liability Assessment Letter and we have no response from you, it is our obligation to inform you of your status as a Delinquent Withdrawn Employer under ERISA and as such, additional assessments are now due. You are required to contact this office within 10 days of the date of this letter to avoid forced collection.

MOST IMPORTANTLY, FAILURE TO MAKE THE NECESSARY PAYMENT WITHIN 60 DAYS OF THE DATE OF THIS LETTER WILL CAUSE YOU TO

BECOME A DEFAULTED WITHDRAWN EMPLOYER UNDER ERISA WHICH PERMITS THE BOARD OF TRUSTEES WITHIN THE ACT TO INSIST UPON IMMEDIATE PAYMENT OF THE ENTIRE OUTSTANDING AMOUNT OF YOUR WITHDRAWAL LIABILITY. You are required by ERISA to make the necessary payments notwithstanding any request you may make for review or appeal of the determination of the amount of your liability or schedule of payments. Any adjustments to your liability will be reflected in future payments. If legal action is required to collect Withdrawal Liability, ERISA requires the court to award to the Plan its costs, attorney fees, interest and liquidated damages.

Sincerely,

GLEN SLAUGHTER & ASSOCIATES
Administrator

cc: Collection Agent
Delinquency Committee
All Trustees
Legal Counsel

[EXHIBIT 4]

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
Attorneys at Law
650 California Street, 20th Floor
San Francisco, California 94108-2693
(415) 433-1940

July 8, 1987

CERTIFIED/RETURN
RECEIPT REQUESTED

Bay Area Laundry and Drycleaning
Pension Fund
P.O. Box 24263
Oakland, California 94623-1263

ATTENTION: GLEN SLAUGHTER & ASSOCIATES

Re: Superior French Laundry
Account No. 0912270

Dear Mr. Slaughter:

Please find enclosed the Notice of Initiation of Arbitration submitted by Superior French Laundry. Please contact me so that we may begin the process of selecting an arbitrator.

Very truly yours,

/s/ William F. Terheyden
WILLIAM F. TERHEYDEN

WFT:gmd
Enclosure

cc: Stephen Barnes (w/enc.)

NOTICE OF INITIATION OF ARBITRATION

Pursuant to the regulations of the Pension Benefit Guaranty Corporation (29 C.F.R. § 2641.2) the Employer, Superior French Laundry (Account No. 0912270), hereby initiates arbitration of a withdrawal liability dispute that it has with the Bay Area Laundry and Drycleaning Pension Fund and its Trustees.

1. On December 12, 1986, the Bay Area Laundry and Drycleaning Pension Fund sent a withdrawal liability assessment and demand for payment which is attached hereto marked Exhibit A.

2. On February 27, 1987, Superior French Laundry made a request for review pursuant to Section 4219 of the Multi-Employer Pension Plan Amendments Act of the withdrawal liability assessed by the Fund. A copy of that request for review is attached hereto marked Exhibit B. Said request for review was received by the Fund on March 3, 1987.

3. The Employer received no response from the Pension Fund to its request for review.

4. The Employer disputes the Plan sponsor's determination of its withdrawal liability and is hereby initating arbitration of the dispute. It includes in its dispute and seeks to arbitrate all of the issues raised in its request for review dated February 27, 1987.

DATED: July 8, 1987

Respectfully submitted,

LITTLER, MENDELSON,
FASTIFF & TICHY

By: /s/ William F. Terheyden
WILLIAM F. TERHEYDEN
A Professional Corporation

Attorneys for Superior
French Laundry

[EXHIBIT 5]

BAY AREA DRY CLEANERS AND LAUNDRY WORKERS PENSION PLANS

AMENDMENT NO. 1

to the
RULES AND REGULATIONS PERTAINING TO EMPLOYER WITHDRAWAL LIABILITY

Effective June 25, 1986, Appendix III, Section 5(d) shall be amended and a new subsection (e) added, as follows:

> "(d) In the event that an Employer fails to make any payment when due, interest at a rate determined by the Trustees in accordance with PBGC regulations, shall accrue on the payment from the due date until the date the payment is made.
>
> (e) An Employer shall be considered in default if failure to make any payment is not cured within 60 days after the Employer receives written notice from the Trustees of such delinquency. An Employer shall also be considered in default immediately upon the filing of any petition in bankruptcy, for reorganization or arrangement, the making of any general assignment for benefit of creditors or bulk sale of assets, or upon insolvency. In the event of default, the outstanding amount of the Employer's withdrawal liability shall immediately become due and payable, together with accrued interest on the total outstanding liability from the due date of the first untimely payment, or the date of default, whichever is earlier."

The undersigned hereby certify that the above Amendment to the Pension Plan was duly adopted by the Board of Trustees at a meeting held on October 23, 1986.

/s/ Rosie M. Carr
Chair

/s/ Jim P. Pettersen
Secretary

BAY AREA DRY CLEANERS AND LAUNDRY WORKERS PENSION PLAN

APPENDIX III
RULES AND REGULATIONS PERTAINING TO EMPLOYER WITHDRAWAL LIABILITY

Section 1. Preamble

This Appendix III to the Bay Area Dry Cleaners and Laundry Workers Pension Plan sets forth rules and regulations applicable to the determination and payment of Employer withdrawal Liability as established under the Multiemployer Pension Plan Amendment Act of 1980 (the Act). These rules and regulations shall apply to complete or partial withdrawals, as defined in the Act, occurring after April 28, 1980. The relevant provisions of the Act shall apply to any matter affecting an Employer's withdrawal liability to the extent that such matter is not addressed in this Appendix III.

Section 2. Calculation of Withdrawal Liability

The amount of the unfunded vested benefits allocable to an Employee under this Section is the product of

(a) the Plan's unfunded vested benefits as of the end of the Plan Year preceding the Plan Year in which the Employer withdraws, less the value as of the end of such year of all outstanding claims for withdrawal liability which can reasonably be expected to be collected from Employers withdrawing before such year; multiplied by

(b) a fraction

(1) the numerator of which is the total amount required to be contributed by the Employer under the Plan for the last 5 Plan years ending before the withdrawal, and

(2) the denominator of which is the total amount contributed under the Plan by all Employers for the last 5 Plan Years ending before the withdrawal, increased by Employer Contributions owed with respect to earlier periods which were collected in those Plan Years, and decreased by any amount contributed to the Plan during those Plan Years by Employers who withdrew from the Plan under this Appendix during those Plan Years.

Section 3. Special Rules with respect to Employer Contributions.

For purposes of this Appendix III, Employer Contributions will be considered "made", and amounts will be considered "contributed" for a Plan Year if they are made on account of employment rendered in such Plan Year provided such Employer Contributions and amounts are paid to the Plan on or before the cut-off date used by the independent qualified public accountant engaged by the Trustees pursuant to section 103(a)(3) of ERISA in determining the total Employer Contribution to be reported on the Plan's Form 5500 for the Plan Year. Contributions and amounts paid to the Plan after such cut-off date will be considered made and contributed for the Plan Year in which they are paid.

Section 4. Actuarial Assumptions.

The actuarial assumptions which shall be used by the Plan's enrolled actuary in determining the unfunded vested benefits of the Plan for purposes of withdrawal liability shall be the same as those used for purposes of determining the Plan's compliance with the minimum funding standards of section 412 of the Internal Revenue Code.

Section 5. Payment of Withdrawal Liabiilty.

(a) Amount of payment

(1) Except as provided in (2) and (4) below, and in (c) and (d) below; an Employer shall pay the amount determined under Section 2 (appropriately adjusted for partial withdrawal as provided in Section 4206 of ERISA and de minimis reductions as provided in Section 2(c) of this Appendix and in Section 4209 of ERISA,) over the period of years necessary to amortize the amount in level annual payments determined under (3) below, calculated as if the first payment were made on the first day of the Plan Year following the Plan Year in which the withdrawal occurs and as if each subsequent payment were made on the first day of each subsequent Plan Year. Such amortization period shall be determined based on actuarial assumptions used in the most recent actuarial valuation of the Plan.

(2) In any case in which the amortization period described in (1) above exceeds 20 years, the Employer's liability shall be limited to the first 20 annual payments determined in (3) below.

(3) Except as provided in (5) below, the amount of each annual payment shall be the product of

(A) the average number of Covered Hours for the three consecutive Plan Years, during the 10 consecutive Plan Years ending before the date of withdrawal, in which the Employer had an obligation to contribute for the greatest number of Covered Hours, and

(B) The highest contribution paid at which the Employer had an obligation to contribute under the Plan during the 10 Plan Years ending with the Plan Year in which the withdrawal occurs.

(C) For purpose of (A) and (B) above, if an Employer withdraws in a Plan Year ending before January 1, 1985, the appropriate number from the following shall be substituted for the number "10" each time such number appears.

If the Employer withdraws in the Plan Year ending	Then the number substituted is
December 31, 1980	5
December 31, 1981	6
December 31, 1982	7
December 31, 1983	8
December 31, 1984	9

(4) In the case of a withdrawal of all or substantially all Employers under the Plan, as described in Section 4219(c)(1)(D) of ERISA, (2) above shall not apply, and total unfunded vested benefits shall be allocated among all such Employers according to regulations established by the Pension Benefit Guaranty Corporation (PBGC).

(5) As described in Section 4219(c)(1)(E) of ERISA, the amount of annual payment may be adjusted in the event of a partial withdrawal.

(b) Withdrawal liability shall be payable monthly, according to the Schedule determined by the

Trustees. Payment of withdrawal liability shall commence no later than 60 days after demand is made therefor by the Trustees.

(c) An Employer shall be entitled to prepay his withdrawal liability and accrued interest without penalty.

(d) In the event that an Employer fails to make any payment when due, interest, at a rate determined by the Trustees in accordance with PBGC regulations, shall accrue on the payment from the due date until the date the payment is made. An Employer shall be considered in default if such failure to make any payment is not cured within 60 days after the Employer receives notice from the Trustees of such failure. In the event of a defualt, the outstanding amount of the withdrawal liability shall immediately become due and payable.

[Filed Nov. 10, 1993]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

(Title Omitted)

PLAINTIFFS' COUNTER-STATEMENT OF UNDISPUTED MATERIAL FACTS

Date: November 24, 1993

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
	Admitted [1]
1. Ferbar Corporation owned three facilities: Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	
2. Contributions were made by Ferbar to the Bay Area Laundry and Dry Cleaning Pension Trust Fund on behalf of employees working at three of its facilities —Superior French Laundry, One Hour Martinizing and Diablo Cleaners.	*Admitted.*
3. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983.	*Admitted.*

---

[1] Where indicated, we have admitted the corresponding statement of fact as set forth in Defendants' Statement herein.

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
4. On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government and Industrial Services Local No. 3.	*Admitted.*
5. Ferbar Corporation made no contributions to the Pension Trust Fund on behalf of Employees working at Superior French Laundry or One Hour Martinizing commencing in March 1985 and thereafter.	*Admitted.*
6. Bay Area Laundry and Dry Cleaning Pension Fund sent a letter to Superior French Laundry dated December 12, 1986 establishing a monthly payment schedule for Superior French's withdrawal liability and notifying it that Superior French's first monthly withdrawal liability payment was due on February 1, 1987.	*Admitted.* Decl. of Geoffrey V. White, Exh. 1.
7. Neither Ferbar Corporation nor Superior French Laundry made any withdrawal liability payment to Bay Area Laundry and Dry Cleaning Pension Fund on or by February 1, 1987.	*Admitted.*
8. Superior French Laundry submitted a Request for Review of its assessed withdrawl liability by the Fund Trustees by letter of February 27, 1987.	Decl. of Geoffrey V. White at p. 2; Exhibit 2.

Plaintiffs' Counter-Statement of Alleged Undisputed Facts	*Supporting Evidence*
9. The Fund notified Superior French Laundry that it was delinquent in payment of its assessed withdrawal liability by letter of April 14, 1987. Neither Ferbar Corporation nor Superior French Laundry have made any payment of withdrawal liability to the present date.	Decl. of Geoffrey V. White at pp. 2-3; Exhibit 3.
10. Superior French Laundry submitted a Notice of Initiation of Arbitration concerning its disputed withdrawal liability by letter of July 8, 1987. No arbitration proceedings have yet been held.	Decl. of Geoffrey V. White at p. 3; Exhibit 4.
11. The Complaint in this action was filed on February 9, 1993.	*Admitted.*

Respectfully submitted,

LAW OFFICE OF GEOFFREY V. WHITE

/s/ Geoffrey V. White
GEOFFREY V. WHITE
Attorney for Plaintiffs

Dated: November 10, 1993

No. 96-370

Supreme Court, U.S.
FILED
JUL 17 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE PETITIONER

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7284

QUESTION PRESENTED

When does the statute of limitations begin to run on an action under the Multiemployer Pension Plan Amendments Act, 29 U.S.C. § 1381 et seq., to collect overdue employer withdrawal liability payments?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-370

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 73 F.3d 971 and is reprinted at pages 1a-5a of the Appendix to the Petition for a Writ of Certiorari (Pet. App.). The opinion of the United States District Court for the Northern District of California is unreported, and is reprinted at Pet. App. 6a-19a.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered an order denying a petition for rehearing on May 13, 1996. In an order entered on August 1, 1996, Justice O'Connor extended the time for filing a petition for a writ

of certiorari to September 10, 1996. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set out as an Appendix to this brief.

STATEMENT OF THE CASE

1. *Statutory Scheme*

The Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, 29 U.S.C. §§ 1381-1461, provides that an employer who withdraws from a multiemployer pension plan must make withdrawal liability payments sufficient to cover that employer's fair share of the plan's unfunded vested liabilities.[1] 29 U.S.C. §§ 1381, 1391. The Act's withdrawal liability payment requirement protects the financial integrity of multiemployer plans, prevents withdrawing employers from shifting their burdens to remaining employers, and eliminates an incentive for employers to flee underfunded pension plans. *See Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 115 S.Ct. 981, 985 (1995) ("*Schlitz*"); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 216 (1986); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722-23 (1984).

As a general matter, an employer completely withdraws from a plan when it "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." § 1383(a). There are particularized definitions of "complete withdrawal" for the building and construction industry (§ 1383(b)), entertainment industry (§ 1383(c)), and trucking and warehousing industry (§ 1383(d)).[2]

[1] Pension funds develop unfunded vested liability when the actuarial value of pension benefits nonforfeitable under ERISA § 1301(a)(8)) exceeds the plan's assets. (All statutory references in the form "§ ——" are to 29 U.S.C. § ——.)

For complete withdrawals, the statute defines the "*date* of a complete withdrawal" as "the date of the cessation of the obligation to contribute or the cessation of covered operations." § 1383(e) (emphasis supplied). The amount of withdrawal liability and the periodic payment schedule for paying that liability are determined as of statutorily-specified dates calculated from the "date of complete withdrawal." *Schlitz*, 115 S.Ct. at 986, 992, citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A).[3] The statute sets out a series of steps to be followed in collecting the withdrawal liability, as follows:

a. MPPAA places responsibility for assessing and collecting withdrawal liability on the plan sponsor, almost always a joint labor-management board of trustees. § 1382, § 1002(16)(B). "As soon as practicable" after an employer's withdrawal from the plan, the plan sponsor must determine the employer's withdrawal liability, if any, prepare a statutorily-mandated schedule for payment of that liability in installments, notify the employer of the amount of the liability and the payment schedule, and "demand payment in accordance with the schedule." §§ 1382, 1399(b).

The complex calculations necessary for a plan's actuary to determine an employer's withdrawal liability are described in *Concrete Pipe & Prods. v. Construction La-*

[2] MPPAA also provides for withdrawal liability in the event of a partial withdrawal. 29 U.S.C. § 1381(a). A "partial withdrawal" ordinarily occurs if "for [a] plan year: (1) there is a 70-percent contribution decline or (2) there is a partial cessation of the employer's contribution obligation." § 1385(a). A particularized definition of "partial withdrawal" applies to the retail food industry. § 1385(c).

[3] In many instances, the statutory "date of complete withdrawal" must be determined based on events occurring long after that date has passed. *See* pp. 17-19, *infra*.

borer's Pension Trust, 508 U.S. 602, 609-10 (1993). *See* §§ 1388-1391, 1393. Once the actuary has calculated the withdrawal liability, the plan sponsor must prepare a schedule for the payments by determining the "level annual payments" necessary to amortize that liability, using a statutory formula pursuant to which the amount of each annual payment roughly approximates the withdrawing employer's typical contribution to the plan in earlier years. *See Schlitz*, 115 S.Ct. at 986; § 1399(c)(1).[4] Finally, these "level annual payments" are made "payable in four equal installments due quarterly," unless the plan rules specify other installment intervals. § 1399(c)(3).

b. Having completed the calculations, the plan sponsor then provides the withdrawing employer with notice of its withdrawal liability and installment payment schedule, and the employer may, within 90 days, ask the plan sponsor to review the determination of liability or the payment schedule. § 1399(b)(2)(A)(i). After this review, "[a]ny dispute between an employer and the plan sponsor . . . shall be resolved through arbitration," which either party may initiate within specified time periods. § 1401(a). Review of the arbitrator's decision is available through an action in the district court to enforce, vacate, or modify the award. § 1401(b)(2).

After receiving the plan sponsor's assessment notice, however, the employer must begin to make withdrawal liability payments "in accordance with the schedule set forth by the plan sponsor . . . beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule." § 1399(c)(2). *See also* § 1401(b) & (d) and § 1399(c)(3).[5]

[4] If the annual payments would stretch past 20 years, the remaining payments ordinarily are forgiven. 29 U.S.C. § 1399(c)(1)(B).

[5] The employer has the option "to prepay the outstanding amount of the unpaid withdrawal liability payments . . ., plus accrued interest, if any, in whole or in part, without penalty." 29 U.S.C. § 1399(c)(4).

c. An acceleration provision in the statute provides that, in the event of a "default" by the employer, the "plan sponsor may require immediate payment of the outstanding amount of the employer's withdrawal liability." § 1399(c)(5); *see also* 29 C.F.R. § 4219.31(b)(2). The statute defines "default" for purposes of this acceleration provision as "the failure of an employer to make, when due, any payment under this section if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. § 1399(c)(5)(A). A "default" can also "be any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability." § 1399(c)(5)(B).

A PBGC regulation prohibits a declaration of "default" based on missed payments during the review and arbitration process. The regulation provides that no default can occur until at least 60 days after the later of (i) expiration of the period for requesting review by the plan; (ii) expiration of the period for initiating arbitration; or (iii) issuance of the arbitrator's decision, if arbitration is timely initiated. 29 C.F.R. § 4219.31(c)(1). The regulation echoes the statute, however, in providing that during this period of review, "amounts due . . . shall be paid in accordance with the schedule established by the plan sponsor. If the payment is not made when due under the schedule, the payment is overdue . . . ." 29 C.F.R. § 4219.31(c)(2).

d. If the employer does not make a scheduled withdrawal liability payment, the plan sponsor may bring suit under MPPAA's civil suit provision, 29 U.S.C. § 1451:

> A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to

> a multiemployer plan . . . may bring an action for appropriate legal or equitable relief, or both. [§ 1451(a)(1)]

This civil suit provision gives state and federal courts concurrent jurisdiction over "an action brought by a plan fiduciary to collect withdrawal liability," § 1451(c), and provides that:

> In an action . . . to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title.) [§ 1451(b)][6]

The statute of limitations for actions under § 1451, including actions to collect withdrawal liability, is contained in § 1451(f):

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

2. ***Facts***

Ferbar Corporation ("Ferbar") contributed to the Bay Area Laundry and Dry Cleaning Pension Fund ("Fund") for several years for the employees of three laundries. Joint Appendix (J.A.) 19. On or about March 1, 1985, Ferbar ceased all contributions. J.A. 20.

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[6] Section 1145 provides that employers contractually obligated to make contributions to a multiemployer plan have a statutory obligation to do so.

On December 12, 1986, the Trustees of the Fund assessed withdrawal liability against Superior French Laundry, one of three laundries operated by Ferbar, in the amount of $45,570.80. J.A. 23. The assessment notice informed Ferbar that it could, if it wished, make a single lump-sum payment of the total withdrawal liability within 60 days after receipt of the notice, but otherwise must make monthly installment payments of $345.50 commencing February 1, 1987. J.A. 23. The schedule of monthly payments would continue for 240 months, concluding with a final payment of $344.96. The notice also stated that Ferbar was required by law to make the payments as scheduled notwithstanding any request for review or appeal. J.A. 23.

By letter dated February 27, 1987, Ferbar exercised its right to request review of the assessment. J.A. 31. During the pendency of the review, Ferbar made no withdrawal liability payments. J.A. 20, 46.

Having received no withdrawal liability payments, the Trustees, on April 14, 1987, notified Ferbar of the delinquency. J.A. 35. The delinquency notice stated that Ferbar had sixty days to cure the delinquency, or it would be in "default," in which case the full amount of the outstand- withdrawal liability payments could be accelerated. J.A. 35. The notice of delinquency also notified Ferbar once again that ERISA required it to make the scheduled payments notwithstanding any request Ferbar might make for review or appeal of the Fund's determination. J.A. 35.

Ferbar did not cure its delinquency after receiving the delinquency notice, but did, on July 8, 1987, file with the Trustees a notice of initiation of arbitration of its disputed withdrawal liability. J.A. 20, 37, 47.

3. ***Proceedings***

a. On February 9, 1993, the Fund's Trustees filed in district court a "Complaint for Collection of Employer Withdrawal Liability Payments" against Ferbar. J.A. 6.

February 9, 1993 was eight days more than six years after the first withdrawal liability payment was due according to the payment schedule contained in the Fund's assessment notice, but *less* than six years before the second payment and the remaining payments were due. The Complaint sought (i) the total amount of the unpaid withdrawal liability, or, in the alternative, (ii) the total of the overdue payments and an injunction requiring Ferbar to make the remaining payments. J.A. 11-12.

After answering the Complaint, Ferbar filed a Motion for Summary Judgment based solely on the applicable statute of limitations. J.A. 1, 13. The Trustees filed a cross-motion for summary judgment on the same issue. J.A. 1. The relevant dates, set out above, were not disputed. J.A. 19, 45.

b. The District Court held that the Trustees' cause of action arose, and the limitations period on the entire amount of the withdrawal liability began to run, on February 1, 1987, when Ferbar failed to make the first installment payment on the date scheduled. Pet. App. 12a. On that basis, the District Court held the Trustees' action was entirely time-barred under the three-year "discovery" statute of limitations set forth in § 1451(f)(2), notwithstanding the express language in the statute providing that the applicable limitations period is "the later of" the three-year discovery period in § 1451(f)(2) or the six-year period in § 1451(f)(1). Pet. App. 9a-11a. Alternatively, the District Court held that the Trustees' action was also entirely time-barred under the six-year limitations period in § 1451(f)(1), since the lawsuit was filed a few days more than six years after the first payment was due according to the Trustees' demand letter. Pet. App. 11a-18a.

c. On appeal from dismissal of the action, the Ninth Circuit held that the District Court had erred by applying the three-year discovery limitations period in § 1451(f)(2), recognizing that § 1451(f) "clearly directs courts to apply 'the later of' the two periods of

limitations' " and that, "[o]n the facts of this case" the six-year accrual period in § 1451(f)(1) was the later one. Pet. App. 3a.

The Ninth Circuit nonetheless affirmed the judgment dismissing the case in its entirey, holding that the action was time-barred under the six-year limitations period of § 1451(f)(1). Pet. App. 5a. Unlike the District Court, the Ninth Circuit ruled that the § 1451(f)(1) limitations period begins to run not when payments are due but on the statutory "date of complete withdrawal." Pet. App. 4a-5a.

In so holding, the Ninth Circuit stated that it was bound by its own decision in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994). In *Thibodo* the Ninth Circuit held that "for actions to recover withdrawal liability incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." *Id.* at 916-17. Ferbar had ceased making contributions to the Fund on March 1, 1985, so that was the date of withdrawal. *See* § 1383(e). Because the Trustees' action was filed on February 9, 1993, more than six years later, the Ninth Circuit affirmed the summary judgment for Ferbar. Pet. App. 5a.

Judge Trott concurred reluctantly in the Ninth Circuit's decision, stating that he was compelled to join in the judgment by the court's previous decision in *Thibodo*. In his concurrence, Judge Trott, noting that the D.C. Circuit had, in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989), decided the same statute of limitations issue differently than the Ninth Circuit, expressed the view that *Joyce* "does a better job of answering the questions raised by these issues. . . ." Pet. App. 5a. In *Joyce*, the District of Columbia Circuit held that the limitations period for an action to collect withdrawal liability begins to run not

on the date of withdrawal, but upon the date of the employer's failure to make payments in accordance with the payment schedule.

SUMMARY OF ARGUMENT

I. As a general matter, a statute of limitations runs from the date that a cause of action could have first been filed, and a cause of action can first be filed, or "accrues," when the defendant breaches some legal obligation. MPPAA follows these usual rules, providing that the statute of limitations runs from when the "cause of action arose," and that a cause of action arises whenever there is an "act or omission . . . under the statute" that injures the plaintiff. §§ 1451(a) and (f).

Considering seriatim the various junctures in the statutory scheme which might be thought to signal an employer obligation with respect to withdrawal liability, it becomes clear that an employer's statutory duty with respect to such liability is to make periodic payments when due after demand by the plan's trustees, nothing more. Consequently, as is true generally of creditors seeking to recover payments of debts, until at least one payment was overdue, the Fund had no "complete and present cause of action" (*Rawlings v. Ray*, 312 U.S. 96, 98 (1941)), "hence the statute of limitations did not begin to run" until then. *Id.*

That conclusion, however, is only a beginning in settling the statute of limitations issue raised by this case. Employers under MPPAA have an obligation to make a *series* of level payments over time according to a fixed schedule, not simply an obligation to make a single payment on the date fixed for the first payment. Since this case sought collection of many missed payments, not one, this suit was time-barred in its entirety only if the causes of action on each and every one of the required periodic withdrawal liability payments accrued more than six years before suit was filed.

That cannot be the case here. Ordinarily, an employer has no obligation under MPPAA to begin to make payments any sooner than that payment is due on the schedule set out by the plan sponsor at the outset, so that there is no actionable "act or omission" under the statute with regard to a particular periodic payment unless and until the employer fails to make *that payment* on the day it comes due. And MPPAA's statutory provision for separate causes of action, and therefore the running of separate limitations periods, with respect to each missed periodic payment is fully consistent with the legal principles that generally govern the running of statutes of limitations on obligations pay off a debt by making a series of installment payments. Applying both those traditional legal principles and the statutory language, one concludes that a § 1451 cause of action accrues upon the due date of each missed payment, and that separate limitations periods therefore begin from the date of each missed payment for the collection of the amount due on that date.

The last question in determining the statute of limitations question in this case is whether the employer was for any special reason obligated to pay the withdrawal liability as a whole, rather than on the usual, statutorily-established installment-by-installment basis, at any time outside the limitations period. While MPPAA does *allow* the plan sponsor to accelerate the entire debt once the employer misses a single payment, the acceleration provision is permissive, not automatic, and triggers no employer obligation to pay the entire amount of the debt unless the plan sponsor elects to so demand, in accord with statutory procedures and timing requirements. Again traditional legal principles recognize that such a permissive acceleration provision does not alter the general rule that the statute of limitations begins to run with each missed periodic payment unless and until the creditor exercises the option to accelerate the debt.

Here, the acceleration option was not even available until well within the limitations period, for two reasons.

First, default, a statutory prerequisite to acceleration, cannot be declared under the statute until sixty days after the first missed payment, that is, in this case, April 2, 1987 at the very earliest. And second, default also cannot be declared, under the PBGC's interpretation of the statute in its regulation, until the employer's time for challenging the assessment has run—here, March 12, 1987 at the very earliest and in fact, later than that, since the employer did in fact challenge the assessment. Ferbar therefore cannot possibly have had an obligation to pay the entire withdrawal liability debt before February 10, 1987, and the action was therefore timely on February 9, 1993 with regard to all missed payments due on or after February 10, 1987.

II. The Ninth Circuit ruled otherwise, holding that the limitations period begins to run on the date the employer withdraws from a multiemployer pension fund. This conclusion simply cannot be squared with the statutory language and structure, and would lead to all manner of absurd results.

Moreover, the reasons the Ninth Circuit gave to justify bending the statute out of shape would not be convincing even if pertinent. In particular, the Ninth Circuit's concern that, absent its limitations rule, withdrawal liability may not be assessed promptly, is not a valid one: The statute provides that the assessment must be made "as soon as practicable," § 1399(b)(1), and limits amortization interest so that it does not accrue during any delay in assessing liability. As a result, undue procrastination by the Trustees in making the assessment and notifying the withdrawing employer could give rise to an employer defense to the obligation to pay its liability and to an actionable breach of fiduciary duty by the Trustees for failure to collect withdrawal liability in a timely manner. There is, consequently, no basis for inventing a limitations period with no statutory support in order to cure a problem that the statute itself addresses quite adequately.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR ACTIONS UNDER MPPAA TO COLLECT OVERDUE EMPLOYER WITHDRAWAL LIABILITY PAYMENTS RUNS FROM THE DATE OF EACH MISSED PAYMENT.

The ultimate question in this case is whether this action to collect Ferbar's unpaid withdrawal liability is, as the Ninth Circuit held, time barred in its entirety. If it is not, then the case should not have been dismissed.

Answering that question requires, first, determining the *earliest* date on which a suit could have been filed to collect *any* part of Ferbar's unpaid withdrawal liability payments. That date is the day that Ferbar's first withdrawal payment was due and went unpaid. Under both ordinary statute of limitations principles and the plain words of MPPAA, *no* limitations period could begin to run until that date.

That, however, is only the first cut in answering the timeliness question posed here. A complete answer requires further inquiry as well, into the precise nature of the withdrawal liability payment obligation MPPAA creates and the limitations principles that govern breaches of an obligation of that kind.

Under MPPAA, the plan sponsor *must* permit the payment of an employer's withdrawal liability *by level installments over a period of up to twenty years.* Thus, under the circumstances obtaining here, the Fund could not have required Ferbar to pay any *more* than the first periodic payment determined according to statutory standards at the time that first payment was due. That being so, the Fund could not have sued to recover any more than the amount of the first payment on the day that payment was due and went unpaid.

In accord with well-established general principles concerning the accrual of a collection cause of action for unpaid

installments on a debt, the only cause of action that possibly could have accrued under those circumstances at the time of the first missed payment was a cause of action for collection of *that single payment*. The causes of action for collection of the second payment and the remaining required level payments due thereafter accrued later, less than six years before suit was filed. This suit was therefore not time-barred, and should not have been dismissed.

1. Statutes of limitations require that a plaintiff file a particular action within a specified amount of time. Limitations periods therefore have long been understood to begin to run, or "accrue", "when the right of action is complete" (*Clark v. Iowa City*, 87 U.S. 583, 589 (1875)), that is, when the plaintiff's right " 'has accrued in a shape to be effectually enforced' " (*United States v. Wurts*, 303 U.S. 414, 418 (1938), quoting *Borer v. Chapman*, 119 U.S. 587, 602 (1887)). "The time when the plaintiff could first have maintained the action to a successful conclusion" (51 Am. Jur. 2d, *Limitation of Actions* § 107 (1970)) is, in consequence, ordinarily the critical date on which the limitations period begins to run. *See also Amy v. Dubuque*, 98 U.S. 470, 474 (1879) (" 'When might this action have been instituted is the question; for from that time the statute [of limitations] must run.' "), quoting *Wilcox v. Plummer's Executors*, 29 U.S. 172, 181 (1830).

As the Court has noted, "it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations has run, but at another time for the purpose of bringing suit." *Reiter v. Cooper*, 507 U.S. 258, 267 (1993). But, as *Reiter* adds, "we will not infer such an odd result in the absence of any indication in the statute." *Id. See also United States v. Wurts*, 303 U.S. 414, 418 (1938) ("It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued."); *Greyson v. Harris*, 279 U.S. 300, 304-305 (1929) (reasoning that it would be "anomalous" for a statute of limitations to begin to run "before any cause of action had accrued on which [plaintiff] could have brought suit" and consequently concluding that "[t]his, manifestly, was not intended" by Congress).

Here, it is plain from the statutory language and structure that in MPPAA Congress followed the general rule and not some "odd" variant. Actions under MPPAA are timely if filed not more than "6 years after *the date on which the cause of action arose*." 29 U.S.C. § 1451(f)(1) (emphasis supplied). The statute thus explicitly links the start of the limitations period with the accrual of the cause of action against which the limitations period will run. Accordingly, in determining when the six-year limitations period begins to run on an action to collect withdrawal liability payments under MPPAA, the pertinent question is the usual one: "When might this action have been instituted?" *Amy v. Dubuque*, 98 U.S. at 474.

2. MPPAA provides for suit by trustees "adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan." § 1451. Until there has been some "act or omission" by an employer contrary to some statutorily-imposed obligation in connection with the employer's withdrawal from a multiemployer plan, then, no legal injury to the plan has occurred, and no suit could be filed.

Considering seriatim the various junctures in the statutory scheme which might be thought to signal such an employer obligation, it becomes apparent that under MPPAA's withdrawal liability provisions, an employer's statutory duty is to make each withdrawal liability payment when due after demand by the fund trustees, and nothing more. Consequently, as is true generally of creditors seeking to recover payment of debts, until at least one payment was overdue the fund has no "complete and present cause of action," *Rawlings v. Ray*, 312 U.S. 96,

98 (1941), "hence the statute of limitations did not begin to run," *id.*, until that date.

(a) First, while MPPAA demarcates withdrawal as a statutorily-defined event from which legal obligations flow, MPPAA does not make the act of withdrawing from an underfunded multiemployer pension plan unlawful itself, or a breach of any statutory obligation. Complete and partial withdrawals occur on a regular basis as a result of normal, lawful decisions by employers, labor unions, and employees. The purpose of MPPAA was not to sanction withdrawals, but to provide a mechanism for preserving the long-term financial integrity of multiemployer plans in the face of such employer turnover.

Since MPPAA provides no employer obligation to refrain from withdrawal, there is no basis for plan trustees to sue an employer merely for withdrawing from a plan.

(b) Nor does withdrawal as such, or the date of withdrawal, have significance under the statute as a date on which withdrawing employers are supposed to *do* something which, if left undone, could give rise to a collection lawsuit.

The statutory "date of complete withdrawal" (§ 1383(e)) or of "partial withdrawal" (§ 1385) is a date set largely for purposes of fixing withdrawal liability. The statute defines the "*date* of a complete withdrawal" as "the date of the cessation of the obligation to contribute or the cessation of covered operations" § 1383(e) (emphasis supplied), and the date of "partial withdrawal" as "the last day of a plan year" in which a specified decrease in an employer's contributions or contribution obligation is completed. § 1385(a).

Assessment of the total *amount* of liability for complete withdrawal in turn, is based on "the withdrawing employer's fair share of a plan's underfunding . . . as of the last day of the plan year preceding the year during which the employer withdrew." *Schlitz*, 115 S.Ct. at 986, citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i),

(c)(3)(A), and (c)(4)(A). And the *interest component* of the periodic payments that are the basic way of satisfying an employer's withdrawal liability obligation is "calculated as if the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs. . . ." 29 U.S.C. § 1399(c)(1)(A)(i); *Schlitz*, 115 S. Ct. at 992. The date of withdrawal, therefore, is not even the date as of which withdrawal liability payments are calculated, but only a benchmark used in determining the relevant dates for that purpose.

Indeed, the statute defines the date of withdrawal in such a way that, in many instances, that date is necessarily determined retroactively, rather than at the time withdrawal is deemed to occur. For example, in most industries, a complete withdrawal takes place when the employer "*permanently* ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (emphasis supplied). "This determination cannot necessarily be made upon complete withdrawal; rather, it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce v. Clyde Sandoz Masonry*, 871 F.2d at 1123. *See also Trustees of Ironworkers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 210 n.4, 212-214 (7th Cir. 1989) (considering dispute over when operations permanently ceased to determine date of complete withdrawal).

Similarly, in industries covered by § 1383(a), a complete withdrawal can also occur if the employer "*permanently* ceases to have an *obligation* to contribute under the plan." § 1383(a) (emphasis supplied). Whether an employer has an *obligation* to continue to make contributions under a collective bargaining agreement is often not definitively established until months or years after the employer in fact stops making payments.[7]

[7] The employer may, for example, take the position that it has bargained in good faith to impasse and is therefore entitled to implement its last contract offer which discontinues contributions,

MPPAA also provides for special withdrawal rules for certain industries, under which it is even more likely than under the generally-applicable withdrawal rules that withdrawal will have to be determined retroactively. In the building and construction industry, for example, MPPAA provides that complete withdrawal occurs on the date an employer within that industry "ceases to have an obligation to contribute under the plan," but *only if* the employer either continues performing work within the jurisdiction of the collective bargaining agreement that required contributions to the plan *or* "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." § 1383(b)(2)(B)(ii). Since much construction work "is generally of a project-by-project nature" (126 Cong. Rec. 23,040 (August 25, 1980) (statement of Rep. Thompson)), determining whether there has been a withdrawal under this provision, and when, may require waiting as much as five years after an employer completes a project to see whether the employer returns to do work in the area.[8]

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while the union maintains that there was no good faith impasse and therefore no cessation of the contribution obligation. Whether an impasse exists may not be resolved until the conclusion of a National Labor Relations Board proceeding years later. *See Laborers Health & Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988). If the employer's position is upheld, the "date of complete withdrawal" will relate back to the date when its final contract offer was implemented and its obligation to make contributions ceased. § 1383(a) ("a complete withdrawal . . . occurs when an employer permanently ceases to have an obligation to contribute under the plan"); *see Cuyamaca Meats v. Pension Trust Fund*, 827 F.2d 491, 496-500 (9th Cir. 1987) (considering dispute over when obligation to contribute ceased to determine date of complete withdrawal).

[8] A similar provision for delayed determination of withdrawal covers certain entertainment industry employers and can, if the PBGC so determines under its regulations, cover employers in other industries as well. § 1383(c) & (f).

For certain trucking industry employers, whether a withdrawal has occurred or not is necessarily retroactively determined, since

To give one final example, under § 1398(2), a withdrawal does not occur if contributions are suspended during a labor dispute; if, when the dispute ends, however, the cessation in contributions turns out to have been permanent, the withdrawal date will then be fixed and will be based on the earlier date on which contributions in fact ceased. § 1383(e).[9]

The date of withdrawal, then, does *not* denote the date on which any employer obligation is to be performed which, if breached, could give rise to a cause of action. The withdrawal date, instead, is only a statutory reference point, and is often retroactively determined.

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the determination of withdrawal depends upon post-withdrawal actions of the PBGC. Such employers are deemed to have withdrawn after they "permanently cease[] to have an obligation to contribute under the plan or permanently cease[] all covered operations under the plan" (§ 1388(d)(3)(A)), but *only* if the PBGC "determines that the plan has suffered substantial damages to its contribution base as a result of such cessation" or the employer fails to furnish a surety bond in accordance with statutory specifications. § 1383(d)(3)(B). Even if the PBGC does not make an initial determination of "substantial damage" and the employer does post an adequate bond, the PBGC can determine up to five years later that the employer's withdrawal has resulted in "substantial damage" to the plan, with the result that the employer is then retroactively "treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased." § 1383(d)(4).

[9] *See Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852, 855 (3rd Cir. 1994) (employer's contributions to the Fund ended in 1981 during a strike; the Fund determined in 1984, when the dispute remained unresolved, that the cessation was permanent, and assessed withdrawal liability as of 1981; the employer maintained, however, that it had not withdrawn from the Fund in 1981, because the dispute was still not over as of 1984, and the cessation might still turn out to be temporary); 126 Cong. Rec. 23,038 (Aug. 25, 1980) (statement of Rep. Thompson) ("An employer is not considered to have withdrawn solely because it suspends contributions during a labor dispute . . . . [but only if] the facts and circumstances of the particullar situation indicate that contributions have ceased permanently.")

(c) Finally, where an employer withdraws from a multiemployer plan, MPPAA does not provide for any automatic, self-determinable employer obligation to pay a certain amount on some ascertainable date after withdrawal. Instead, the statute makes the assessment of liability and notification of a schedule of payments a duty of plan trustees, applying statutory standards, and imposes a duty on employers only to make payments in accordance with that notification.

The plan trustees must determine whether a withdrawal has occurred and the amount of the employer's withdrawal liability, if any.[10] § 1382. Then, "as soon as practicable," the trustees must "(A) notify the employer of—(i) the amount of the liability, and (ii) the schedule for liability payments, and (B) demand payment in accordance with the schedule." § 1399(b)(1).

The statute "makes clear," as this Court recognized in *Schlitz*, "that the withdrawing employer owes nothing until its plan demands payment." 115 S.Ct. at 988. "In fact, the withdrawing employer cannot determine, or pay, the amount of its debt, until the plan has calculated that amount." 115 S.Ct. at 988.[11]

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[10] It is entirely possible that the withdrawing employer will owe nothing altogether, even if the plan has unfunded vested liability. *See* § 1391(b)(1) (providing that in some situations "the unfunded vested benefits allocable to the employer shall be zero."); § 1389 (establishing a "de minimus" rule under which an employer who would owe a relatively small amount of withdrawal liability may be excused from paying anything); *see* Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S.1070, The Multiemployer Penion Plan Amendments Act of 1980: Summary and Analysis of Consideration 17 (Committee Print 1980) (explaining "de minimus" rule).

[11] Calculation of withdrawal liability depends upon information about the actuarial and financial status of the fund in the aggregate and of the employer's proportional share of the fund's liability, information that the fund has but the employer usually does not. *See* § 1401(e) (providing that the employer may request such information from the fund, some of which is to be provided without cost and some of which the fund can charge for providing.)

It is when the withdrawing employer has been served by plan trustees with a schedule for payment of withdrawal liability that MPPAA first imposes a legally cognizable obligation on the employer. To be sure, at that point, the employer is entitled to request that the trustees review the determination of liability and/or the payment schedule, § 1399(b)(2), and, if dissatisfied, may initiate arbitration. § 1401(a). But the statute provides in express terms that "[w]ithdrawal liability *shall be payable in accordance with the schedule* set forth by the plan sponsor . . . *notwithstanding* any request for review or appeal of determinations of the amount of such liability or of the schedule" § 1399(c)(2) (emphasis supplied). *See also* § 1401(d) (when arbitration has been timely initiated, "[p]ayments shall be made by the employer in accordance with the determinations made under this part until the arbitrator issues a final decision . . . ."; § 1401(b)(1) ("[i]f no arbitration proceeding has been initiated, . . . the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor"); § 1451(b) ("any failure of the employer to make any withdrawal liability payment with the time prescribed shall be treated in the same manner as a delinquent contribution").

Thus, MPPAA does not require the withdrawing employer to pay withdrawal liability until the fund demands payments, or to make any withdrawal liability payment before it is due on the fund-provided schedule. What MPPAA *does* require of an employer is to make the schedule of payments so demanded, on time. An employer who does not do so *does*, indeed, breach a statutory duty.

(d) When that breach occurs, *a* "cause of action" for collection of withdrawal liability *does* "arise" under MPPAA. § 1451(f).

MPPAA directs the plan trustees, in addition to notifying the employer of its withdrawal liability and demanding payment, to "collect the amount of the withdrawal liability from the employer." § 1382(3). As a means toward that end, the statute provides for concurrent federal and state court jurisdiction over "an action brought by a plan fiduciary to collect withdrawal liability." § 1451(c). And, the statute provides that "[i]n any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution" (§ 1451(b)), thereby entitling the trustees to recover the overdue payments, plus interest and liquidated damages, plus their attorney's fees. *See* § 1451(b), § 1145, § 1132(g).

It is on the date that the employer fails to make payment when due that the trustees may initiate such a collection suit—and not any earlier. Accordingly, for an action to collect withdrawal liability, the date of the first missed payment is the earliest date on which the statute of limitations could have begun to run for any of the liability payments. § 1451(f).

This analysis is confirmed by the general run of cases concerning the accrual of causes of action for collection of debts. For example, this Court addressed an essentially similar statute of limitations issue in *Rawlings v. Ray*, *supra*, holding that the statute of limitations began to run for an action to collect a debt when payment was overdue. As the Court recognized, although the debt existed earlier, until payment was overdue the creditor had no "complete and present cause of action" (312 U.S. at 98; citations and internal quotation marks omitted) to recover it, so the limitations period did not begin to run:

> While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. ***Respondent was allowed until that date to pay and prior thereto suit could not be brought against him. Hence the statute of limitations did not begin to run*** until December 13, 1935 . . . . [*Id.* (emphasis supplied.)]

See also, e.g., Moline Plow Co. v. Webb, 141 U.S. 616 (1891) (limitations period on promissory notes begins to run on their maturity dates); *Clark v. Iowa City*, 87 U.S. at 589 (limitations period on bond coupons begins to run from their respective maturity dates because that is when "a complete right of action upon such claims exists in the holder"); *Amy v. Dubuque*, 98 U.S. at 474 (1879) (same).

3. The conclusion that a multiemployer plan has *a* collection cause of action available when the withdrawing employer fails to make a single payment is only the first step in settling the limitations issue presented here. For employers under MPPAA have an obligation to make a series of level payments over time, according to a fixed schedule, not simply the obligation to make a single payment on the date fixed for the first payment. Since this case sought collection of many missed payments, not one, this suit was time-barred in its entirety only if the causes of action for payment of each and every one of those required withdrawal liability payments accrued more than six years before suit was filed.

In determining whether that was the case, the pertinent and determinative issues become (i) when do the statutory causes of action accrue, and limitations periods begin to run, for periodic payments due after the first payment; and (ii) when, if ever, does a statutory cause of action accrue, and a limitations period begin to run, on the total withdrawal liability debt. Again, these questions are best answered by ascertaining first, the precise nature of the payment duty imposed upon employers by the statute, and second, how the statute provides for the enforcement of that duty by the fund.

(a) Numerous provisions of MPPAA make clear that the basic obligation imposed by the statute is an obligation to make periodic contributions to the fund as the employer did before withdrawal, not a duty to pay the liability debt as a whole at the outset.

An employer's withdrawal liability under MPPAA is comprised of a series of statutorily-determined "level annual payments," § 1399(c)(1)(A)(i), which are further broken down into a schedule of "4 equal installments due quarterly, or at other intervals specified by plan rules." § 1399(c)(3); *see* § 1399(c)(1)(C) & (E) (specifying the amount of each annual payment). The plan sponsor *must* initially "demand payment in accordance with the schedule," § 1399(b)(1)(B), in amounts consistent with statutory directives, §§ 1399(c)(1)(A) & (C), and *cannot* require an up-front payment in full. The statute adds that "[w]ithdrawal liability shall be payable in accordance with the schedule," § 1399(c)(2), and that, if the employer fails to initiate arbitration, "the amounts demanded by the plan sponsor . . . shall be due and owing on the schedule set forth by the plan sponsor," § 1401(b).

The manner in which the amount of the withdrawal liability payments is calculated—to roughly approximate the employer's contributions to the plan prior to withdrawal—underlines the point that Congress understood the employer's withdrawal liability obligation as one that mimics the obligation to make periodic contributions that existed before withdrawal. MPPAA, indeed, "provide[d] for continued funding by the withdrawn employer in line with its previous contributions so as to make the liability an annual business cost." H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 83 (1980); *see also id.* at 83 (the statute "requires that a withdrawing employer *continue* funding a proportional share of the Plan's unfunded benefit obligations" (emphasis supplied)).

The conclusion that Congress saw the withdrawal liability obligation as essentially one to continue to make timely contributions to the fund, as the employer had before withdrawal, for the period of time necessary to pay off its unfunded vested liability, is reinforced by the statute's explicit directive, twice repeated, that the failure to make a withdrawal liability payment is to be treated as if the employer had failed to make a timely contribution while still participating in the plan. § 1401(d); § 1451(b).

The statute, to be sure, *allows* an employer the *option* to "*prepay* the outstanding amount of the unpaid annual withdrawal liability payments . . . without penalty." § 1399(c)(4), (emphasis supplied). But the employer's basic *obligation* under MPPAA—the statutory duty which the plan sponsor can enforce through a lawsuit—is to pay the installments as they come due.

(b) Because MPPAA requires that an employer make a series of installment payments according to a pre-set schedule, as a matter of pure logic an employer who complies with the obligation to make one payment does not thereby fulfill the obligation to make any and all payments not yet due. Conversely, an employer who fails to make one or several payments does not thereby breach its payment obligation with regard to scheduled payments not yet due at the time of the missed payment or payments, and therefore could not be sued at the time of those missed payments for breach of the obligation to make such later-due payments.

Rather, the employer under MPPAA has an independent statutory obligation with respect to the making of each payment as it becomes due, and a multiemployer plan has a collection cause of action for the employer's failure to make any particular payment. Each such cause of action can arise only at the time the employer does not make a particular payment on the day it comes due, not any earlier. Both MPPAA and the general, back-

ground law covering collection of installment payment obligations so recognize.

(i) MPPAA provides for the accrual of an action to collect *each* periodic payment as it becomes due. First, the MPPAA civil action provision provides as a general matter for suit whenever there has been an "act or omission of any party under this subtitle." § 1451(a). Since the employer's obligation under the statute is to make a series of installment payments as they become due, each failure to do so is an actionable "omission . . . under this subtitle." By the same token, until a particular payment has come due, there has been no "omission . . . under this subtitle" on which a multiemployer plan can file suit for that payment.

More specifically, the statute provides with regard to collection of withdrawal liability in particular:

> In any action under this section [§ 1451] to compel an employer to pay withdrawal liability, any failure of the employer to make *any withdrawal liability payment* within the time prescribed shall be treated in the same manner *as a delinquent contribution.* [§ 1451(b) (emphasis supplied).]

MPPAA therefore contemplates a suit based on a failure to make *any* particular payment at its scheduled time, a cause of action that can only accrue once that payment comes due, and not before.

(ii) The statutory provision for separate obligations, and therefore accrual of separate potential causes of action, each time an employer fails to make an installment payment is consistent with the legal rules generally applicable in the commercial world. *See Schlitz*, 115 S.Ct. at 988 (the similarity between the withdrawal liability obligation imposed by MPPAA and common commercial installment payment schemes is an aid in the interpretation of MPPAA).

Ordinarily, obligations to pay money in installments are breached one installment at a time. That is, the failure of the debtor to make one payment when due is not a failure to make the later scheduled payments not yet due, and does not entitle the creditor to insist upon the remainder. Restatement (Second) of Contracts § 243(3) & cmt. c.; *see also, e.g., New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 680 (1936); *Mobley v. New York Life Ins. Co.*, 295 U.S. 632, 638-39 (1935).

Not surprisingly, the well-settled rule for applying statutes of limitations to installment payments flows from the principle that a separate cause of action accrues with each failure to pay, and provides for separate limitations periods beginning with each failure to make a periodic payment.[12] *See* Annotation, When Statute of Limitations Begins to Run Against Action to Recover Upon Contract Payable in Installments, 82 A.L.R. 316 (1933) ("[I]t has come to be the established rule that when recovery is sought on a note or other obligation payable by installments, the Statute of Limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it."); 51 Am. Jur. 2d, *Limitations of Actions* § 133 (1970); J.K. Angell, *Limitations of Actions at Law* §§ 110-11, at 102-03 (4th ed. 1861); 54 C.J.S. *Limitation of Actions* § 153 (1987); 4 A. Corbin, *Contracts*

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[12] The manner in which statutes of limitations are applied to installment payments stems from the more general rule that, where the plaintiff is injured by a succession of separate acts by the defendant, each of which constitutes a legal violation, the limitations period generally begins anew from the date of each wrongful act, "although commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr v. A.O. Smith Corp.*, 65 U.S.L.W. 4514, 4517 (1997).

§ 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* § 2026C (3d ed. 1978).[13]

Applying these traditional principles as well as the statutory language, the § 1451 cause of action accrues upon the due date of each missed installment payment, and separate limitations periods therefore begin from the date of each missed payment for the collection of the amount due on that date. § 1451(f).

(c) The last question in determining the statute of limitations issue in this case is whether the employer was for any special reason obligated to pay the withdrawal liability as a whole, rather than on the usual, statutorily-established installment-by-installment basis, at any time outside the limitations period. Applying the general rules governing the running of statutes of limitations discussed above, only if there were some such special obligation could the statute of limitations for the total withdrawal liability amount have run before this suit was filed.

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[13] *Accord United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993); *United States v. LaFrance*, 728 F. Supp. 1116, 1119-20 (D. Del. 1990); *Navy Federal Credit Union v. Jones*, 930 P.2d 1007, 1110 (Ariz. App. 1996); *Fenske v. Board of Administration*, 163 Cal. Rptr. 182 (Cal. App. 1980); *Worrel v. Farmers Bank*, 430 A.2d 469, 473-75 (Del. 1980); *Central Home Trust Co. v. Lippincott*, 392 So.2d 931, 933 (Fla. Dist. Ct. App. 1980); *Haughton v. Haughton*, 394 N.E.2d 385, 388 (Ill. 1979); *Ellsworth v. West*, 668 So.2d 402, 405 (La. App. 1996); *Sparta State Bank v. Covell*, 495 N.W.2d 817, 819 (Mich. App. 1992); *Honn v. National Computer Systems*, 311 N.W.2d 1, 2 (Minn. 1981); *Freeman v. Truitt*, 119 So.2d 765 (Miss. 1960); *Vrede v. Koch*, 380 S.E.2d 615, 617 (N.C. App. 1989); *Richter v. Richter*, 126 N.W.2d 634, 638 (N.D. 1964); *Bauers v. City of Lincoln*, 514 N.W.2d 625, 632 (Neb. 1994); *General Theraphysical v. Dupuis*, 385 A.2d 227, 228 (N.H. 1978); *Metromedia v. Hartz Mountain Assoc.*, 655 A.2d 1379, 1380 (N.J. 1995); *Clayton v. Gardner*, 813 P.2d 992, 998-99 (Nev. 1991); *Pagano v. Smith*, 608 N.Y.S.2d 268, 270 (N.Y. App. Div. 1994); *Lancaster Colony Corp. v. Lindley*, 400 N.E.2d 905, 906 (Ohio 1980); *Oklahoma Brick Corp. v. McCall*, 497 P.2d 217 (Okla. 1972); *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d 920, 923 (Tenn. Ct. App. 1982); *Goldfield v. Kassoff*, 470 S.W.2d 216, 217 (Tex. Civ. App. 1971).

(i) MPPAA does contain an acceleration clause, § 1399(c)(5), providing:

> In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. [§ 1399(C)(5) (emphasis supplied).]

"Default" is defined, *inter alia*, as "the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notice from the plan sponsor of such failure." If the plan sponsor properly invokes § 1399(c)(5), one would expect that the employer would incur a statutory obligation to pay the entire liability amount no earlier than 60 days after notification,[14] and a cause of action for that amount would accrue if that obligation, once it matured, were not met.

But for present purposes, the salient point is that the language of the acceleration provision itself confirms that an employer has *no* obligation to pay the entire withdrawal amount simply because one or more payments is missed. Instead, because that provision is in terms permissive, providing that the plan sponsor "may" accelerate the debt, and because that permissive provision is triggered by particular acts by the plan sponsor—providing written notice of delinquency and demanding payment in full—the employer has no obligation to pay the entire withdrawal liability unless the plan sponsor takes up the permission, provides the required notice and makes the

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[14] It is not clear under the statute whether the obligation to pay the entire liability would arise of its own accord 60 days after notice of delinquency, or whether the plan sponsor would have to provide a separate notice invoking the right of acceleration after the 60-day period has run. This ambiguity is not here relevant since, as we develop later, acceleration was not available under the statute at any pertinent time.

necessary demand. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 2, at 28 (1980) ("in the event of a default by an employer in payment of its withdrawal liability, the plan sponsor is to be *permitted* to require immediate payment of the balance of the employer's withdrawal liability" (emphasis supplied)); *id.*, pt. 1, at 84; Joint Committee on Taxation, 96th Cong., 2d Sess., Description of Legislation Relating to Pension Benefit Guaranty Corporation Termination Insurance for Multiemployer Pension Plans 22 (Joint Committee Print March 14, 1980); Senate Labor and Human Resources Committee and Finance Committee, Joint Explanation of S. 1076; Multiemployer Pension Plan Amendments Act of 1980, 126 Cong. Rec. 20,197 (July 29, 1980) (if a default occurs "other than a default occurring while the employer is challenging a plan's determination of withdrawal liability . . . the plan sponsor is to be *permitted* to require [acceleration]" (emphasis supplied)).

As the permissive language also indicates, Congress necessarily contemplated that the sponsor may choose *not* to call in the entire debt simply because one payment was missed.[15] There are many situations in which a responsible commercial creditor will choose *not* to accelerate a debt. For example, a creditor may know that to require immediate payment of the entire amount of the debt would make

[15] A PBGC regulation provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of all or a portion of the outstanding amount of an employers' withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability." 29 C.F.R. § 4219.31(b)(2) (emphasis supplied). By recognizing that acceleration can be partial or whole, this regulation emphasizes that the acceleration provision is one designed to provide plan sponsors with flexibility, not to mandate any obligation on the part of employers to pay, or on plan sponsors to require payment of, the whole liability amount.

the debtor insolvent, precipitating a bankruptcy proceeding in which some or all of the debt could be forgiven, while abiding some missed payments could allow the debtor time to make a financial recovery, make up the missed payments, and resume payment according to schedule. Congress specifically meant for plan trustees to have the same flexibility as other creditors:

> It is expected that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of a responsible creditor concerned with maximizing the total ultimate recovery at supportable costs. [126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson).]

See also Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S.1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 21 (Comm. Print 1980) ("The Committee includes this acceleration rule to reduce the plan's risk of loss with respect to withdrawing employers and to discourage unwarranted delays in payment by withdrawing employers.")

MPPAA's permissive acceleration provision, therefore, does not give rise to any cause of action for the withdrawal liability as a whole unless and until it is properly invoked at the plan sponsor's discretion, and therefore does not affect the running of the statute of limitations unless it is applicable and exercised.

(ii) The conclusion that Congress so intended is reinforced, once again, by the consideration that one would come to precisely the same conclusion applying established principles of commercial law.

Acceleration clauses are ordinarily included in commercial installment payment contracts to protect creditors, because of dissatisfaction with the principle that causes of action accrue only with each missed payment, potentially

necessitating multiple collection suits to avoid the running of statutes of limitation on some of the missed payments while others are still not due. Restatement (Second) of Contracts § 243 cmt. d; 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 8.18, at 254-55 (1990). The general understanding, therefore, has long been that "[w]here the acceleration provision is optional with the creditor, the general theory of the courts is that the provision is for the creditor's benefit; he may or may not take advantage of it." Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of the Statute of Limitations, 34 ALR 897, 900 (1925).

Thus, "where there is an acceleration clause giving the creditor the right upon certain contingencies to declare the whole sum due, the statute [of limitations] begins to run, only with respect to each installment, at the time the installment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option." 51 Am.Jur.2d *Limitation of Actions* § 133 (1970).[16] *See also General Theraphysical v. Dupuis*, 385 A.2d 227, 228 (N.H. 1978) ("[i]t appears to be the universal rule that when an obligation is to be paid in installments the statute of limitations runs only against each installment as it becomes due even though the creditor has the option to declare the whole sum due on default of an installment, unless he exercises that option"); Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of the Statute of Limitations, 34 ALR 897, 900 (1925); Annotation, Acceleration Provision in Note or Mortgage as Affecting the Running of

[16] The exercise of an acceleration clause does not, however, affect the running of the statute of limitations as to payments already past due at the time of acceleration, "since the acceleration clause only accelerates the due date of future installments to the date of the exercise of the right of accleration." 54 C.J.S. *Limitation of Actions* § 153 (1987).

the Statute of Limitations, 161 ALR 1211 (1946); 54 C.J.S. *Limitation of Actions* § 153 (1987); 4 A. Corbin, *Contracts* § 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* § 2027 (3d ed. 1978).[17]

The option of acceleration of the withdrawal liability debt under MPPAA, then, does not affect the date on which a cause of action for the payment of any withdrawal liability installment payment accrues unless that option has been exercised.

(iii) Not only is acceleration an *option* to be exercised by the fund if it chooses, but it is an option available under MPPAA and the applicable PBGC regulations *only* if certain prerequisites are met. In this case, two different statutory prerequisites to the exercise of the acceleration option had not yet occurred at the time of the first missed payment, so that the employer could not possibly have had an actionable duty to pay the entire debt at any time outside the limitations period.

Specifically, the Trustees filed their complaint against Ferbar on February 9, 1993. J.A. 1. This was less than six years after the employer had any obligation to pay any of the installment payments except the first on the schedule established by the Fund. J.A. 20, 24. As we have seen, under MPPAA § 1399(c)(5), the plan

[17] *Accord United States v. Dos Cabezas Corp.*, 995 F.2d at 1490; *United States v. Fertal*, 849 F.2d 354, 356 (8th Cir. 1988); *United States v. LaFrance*, 728 F. Supp. at 1119-20; *Navy Federal Credit Union v. Jones*, 930 P.2d at 1110; *Worrel v. Farmers Bank*, 430 A.2d at 473-75; *Central Home Trust Co. v. Lippincott*, 392 So.2d at 933; *Wall v. Citizens & Southern Bank*, 274 S.E.2d 486, 487 (Ga. 1981); *Frenzel v. Frenzel*, 152 N.W.2d 157, 159-60 (Iowa 1967); *Thomas v. Goff*, 596 P.2d 794, 797 (Idaho 1979); *Ellsworth v. West*, 668 So.2d at 405; *Honn v. National Computer Systems*, 311 N.W.2d at 2; *Becker v. Lammers*, 229 N.W.2d 557 (Neb. 1975); *Clayton v. Gardner*, 813 P.2d at 998-99; *American State Bank & Trust Co. v. Sorenson*, 539 N.W.2d 59 (N.D. 1995); *Pagano v. Smith*, 608 N.Y.S.2d at 270; *Farmers & Merchants Bank v. Templeton*, 646 S.W.2d at 923.

sponsor's option to accelerate is triggered by a "default," defined as "the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." § 1399(c)(5)(A). And, under PBGC regulations, the plan sponsor cannot declare a default because of missed payments until at least 60 days after the later of (i) expiration of the period for requesting review by the plan; (ii) expiration of the period for initiating arbitration; or (ii) if arbitration is timely initiated, issuance of the arbitrator's decision. 29 C.F.R. § 4219.31(c)(1).

Here, since under the payment schedule set out by the Trustees the first payment was not on any view due before February 1, 1987 (*see* p. 35, *infra*), "default" could not have been declared under § 1399(c)(5) until April 2, 1987 at the absolute earliest.[18] And since the period for initiating review by the plan did not run under § 1399(b)(2) until 90 days after the initial, December 12, 1986, demand letter—that is, March 12, 1987—the Fund could not under 29 C.F.R. § 4219.31(e)(1) have declared a default until that date at the very earliest, and then only if Ferbar had failed to initiate review or arbitration.[19]

In this case, then, the employer could not possibly have had any obligation arising before February 10, 1987 to pay the entire withdrawal liability debt. Since that is the case, the above analysis concerning the running of separate limitations periods with regard to each missed payment absent valid acceleration indicates that the action

[18] It is far from clear that a default could have been declared on precisely the sixtieth day after the first missed payment. "Default" runs not from the date of the missed payment but from the date of a notice of delinquency, and that notice is unlikely to be—and probably could not properly be—filed on the very day the payment was due.

[19] In fact, Ferbar did timely initiate review and then arbitration (J.A. 31, 37), so that default could not have been declared on March 12.

was in fact timely on February 9, 1993, as to all missed installment payments due on or after February 10, 1987.

(iv) That leaves only the question whether the suit was timely as to the first missed payment. The Fund's notification to Ferbar made that payment due on February 1, 1987, so on first glance it would appear that this lawsuit was time-barred as to that single, $345.50 payment.

But the assessment notice was sent on December 12, 1996, and MPPAA provides for an automatic 60-day grace period to begin making payment after receiving a demand. *See* § 1399(c)(2) ("[w]ithdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor . . . beginning not later than 60 days after the date of the demand") *see* J.A. 44 (applicable Plan rule provides that "[p]ayment of withdrawal liability shall commence no later than 60 days after demand is made therefor by the Trustees"); *Ludington News Co. and Michigan UFCW/Drug Employers Pension Fund*, 9 Employee Benefits Cas. (BNA) 1913, 1916 n. 1 (Arb, 1988) (§ 1399(c)(2) "allow[s] the withdrawing employer 60 days after demand within which to make payment"); *Carnation Co. and Central States Pension Fund*, 9 Employee Benefits Cas. (BNA) 1409, 1448 (Arb. 1988) (same). Since the 60-day grace period did not expire until February 10, 1987, the employer had no statutory duty to make any payment until then, and no cause of action for failure to pay arose until then. Since the lawsuit was filed February 9, 1993, it would appear that the suit was timely as to the first missed payment as well.

* * * *

The upshot, therefore, is that *at worst* this suit is time-barred as to a single periodic payment and timely as to all the rest of Ferbar's unpaid withdrawal liability obligation, and that the suit may well be, under § 1399(c)(2), timely as to the first missed payment as well.

II. THE NINTH CIRCUIT'S HOLDING THAT THE LIMITATIONS PERIOD BEGINS TO RUN UPON THE DATE OF COMPLETE WITHDRAWAL FINDS NO SUPPORT IN THE STATUTE.

In ruling to the contrary, the Ninth Circuit held that the § 1451(f)(1) limitations period begins to run on the date the employer withdraws from a multiemployer pension fund. This conclusion simply cannot be squared with the statutory language and structure, and would lead to all manner of absurd results. Moreover, the reasons the Ninth Circuit gave to justify bending the statutory scheme out of shape would not be convincing even if the courts were permitted to disregard the statutory scheme as Congress devised it.

1. The limitations period could begin to run on the date of complete withdrawal only if "the right of action [were] complete" on that date, *Clark v. Iowa City*, 87 U.S. at 589, and this lawsuit could have been filed then. But the withdrawal itself violated no statutory duty, and established no employer obligation to do anything on the date of withdrawal, including pay withdrawal liability. *See* pp. 16-19, *supra*. Rather, the employer incurred a statutory obligation to make withdrawal payments only after the Fund's assessment of that liability, and then only on a installment-by-installment schedule established in the letter of demand. *See* pp. 20-25, *supra*.

On the Ninth Circuit's contrary view of the statute, the requirement that "*after* an employer's complete or partial withdrawal" the plan trustees must determine the amount of withdrawal liability and a payment schedule, notify the employer of the liability and the schedule, and demand payment in accordance with the schedule" (§ 1399(b); emphasis supplied), would serve no purpose, as the trustees could simply initiate a lawsuit before doing any of that. Nor would it make sense for the statute to require that the employer be permitted to make payments in accordance with a schedule (*see* § 1399(b)(2), § 1401(b)(1), § 1401(d)), if the trustees could bring suit to collect the entire withdrawal liability amount whenever they chose to do so after withdrawal. And, since MPPAA contemplates that the payment schedule may stretch as long as 20 years, § 1399(c)(1), a limitations period triggered by the employer's complete withdrawal would expire long before many of these installments come due, making those installments, apparently, entirely uncollectible. Congress certainly did not so intend.[20] *See, e.g.*, § 1451(b)(2) (referring to an action based on "any failure of an employer to make any withdrawal liability payment within the time prescribed" not just missed payments within six years of complete withdrawal.)

The foregoing is more than sufficient to show that the MPPAA statutory scheme cannot support the theory that there is a cause of action of any kind to collect withdrawal liability on the date deemed to be the date of complete withdrawal. And absent accrual of such an automatic cause of action, the limitations period could not run from the date of withdrawal.

2. The reasons the Ninth Circuit gave for nonetheless preferring a limitations period beginning with the date of withdrawal would not be persuasive even if they were—as they are not—relevant, given the statutory scheme.

The Ninth Circuit considered its limitations rule "to involve a more natural construction of § 1451(f), which

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[20] The Ninth Circuit apparently recognized that its limitations rule could produce this last absurd result, opining that an employer who begins making installment payments in accordance with the schedule might be deemed to have agreed implicitly to a "contract to pay off the withdrawal liability," and that a plan then "might have a separate claim, with its own statute of limitations, for breach of that contract." Pet. App. 5a n.4. But MPPAA makes clear that an employer has a *statutory* obligation to pay the withdrawal liability, and to make payment in accordance with the schedule set according to statutory requirements, "notwithstanding" the employer's *disagreement* with the plan sponsor's payment demand. 29 U.S.C. § 1399(c)(2), § 1401(d).

sets the limitation as '6 years after the date on which the cause of action arose, or three years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such a cause of action,' " because "[t]here is little reason for the second clause if the cause of action does not come into existence until demand for payment is made and refused." *Thibodo*, 34 F.2d at 918. But the § 1451(f) limitations period applies to *all* actions under § 1451, not just to actions to collect withdrawal liability. For example, MPPAA in addition to regulating the collection of withdrawal liability also regulates mergers and transfers between multiemployer plans (§ 1411), transfers between multiemployer plans and single-employer plans (§ 1412), transfers among plans pursuant to a change in collective bargaining representative (§ 1415), reorganizations (§§ 1421-22), minimum contribution requirements (§§ 1423-24), adjustments in accrued benefits (§ 1425) and plan insolvency (§ 1426). Actions in any of those contexts might implicate the 3-year "discovery rule" of § 1451(f)(2). Applying § 1451(f)(1) in accordance with its terms therefore does not result in a less "natural" construction of the limitations provision as a whole.[21]

[21] The Ninth Circuit also seemed influenced by its perception that the six-year statute of limitations in § 1451(f)(1) is unusually long. In fact, limitations periods of six years are provided by other federal statutes. *See, e.g.*, 28 U.S.C. § 2401 (six-year limitations period for actions against United States, except as otherwise provided); § 2415 (six-year limitations period for actions by United States, except as otherwise provided). Limitations periods of six years or more are also used by many states for actions for breach of written contracts. *See, e.g.*, Ala. Code § 6-2-33 (1996) (ten-year limitation on actions "founded upon any contract"); Ga. Code Ann. § 9-3-24 (1977) (six-year limitation on actions upon contracts); Ind. Code Ann. § 34-1-2-2 (Burns 1996) (ten year limitation on actions upon contracts); Ky. Rev. Stat. Ann. § 413.090 (1996) (fifteen year limitation on contract actions); Mass. Ann. Laws ch. 260 § 2 (1996) (six-year limitation on contract actions); N.Y. Civ. Prac. L. & R. § 213 (1997) (contract actions to "be commenced within six years"); N.D. Cent. Code § 28-01-16 (1995) (six-year limitations period for actions upon a contract); Or. Rev. Stat. § 12.080 (1996) (six-year limitations period for actions on contracts); Wash. Rev. Code § 4.16.040 (1996) (six-year limitations period for actions on contracts).

The Ninth Circuit also considered its rule as necessary to ensure that pension plan sponsors promptly assess and collect withdrawal liability. *Thibodo*, 34 F.3d at 917-18. But the MPPAA, in addition to directing plan trustees to act "as soon as practicable" (§ 1399(b)(1)), already provides ample incentives for trustees to act with dispatch.

First, delay in assessing and demanding payment of withdrawal liability prejudices the plan through the loss of interest. Calculation of an employer's total withdrawal liability is based on "the withdrawing employer's fair share of a plan's underfunding . . . . as of the last day of the plan year preceding the year during which the employer withdrew." *Schlitz*, 115 S.Ct. at 986 (emphasis omitted), citing §§ 1391(b)(2)(A)(ii), (b)(2)(E)(i), (c)(2)(C)(i), (c)(3)(A), and (c)(4)(A). The "level annual payments" necessary to amortize an employer's withdrawal liability are then "calculated *as if* the first payment were made on the first day of the plan year following the plan year in which the withdrawal occurs and *as if* each subsequent payment were made on the first day of each subsequent plan year." § 1399(c)(1)(A)(i) (emphases supplied). Because this statutory formula does not take into account the period between the withdrawal date and the plan sponsor's subsequent demand for payment, the plan loses interest for that period. *Schlitz*, 115 S. Ct. at 990 ("[I]n making the first installment 'payable' only after the plan demands it, MPPAA contemplates that an employer sometimes must pay its actual first installment long after the withdrawal year . . . in which case no interpretation of the statute can avoid an employer's actually paying something less than its fair share of interest.") By contrast, once the plan sponsor demands payment in accordance with the schedule, "[i]f a payment

is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made." § 1399(c)(3).

Second, an employer prejudiced by a plan sponsor's failure to demand payment of withdrawal liability "as soon as practicable" (§ 1399(b)(1)) can raise that failure as a defense in arbitration to the assessment of withdrawal liability. *Giroux Bros. Transportation, Inc. v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d 1, 2, 4 (1st Cir. 1996); *Joyce v. Clyde Sandoz Masonary*, 871 F.2d at 1126-27. *See, e.g., Korman Corp. and Teamsters Pension Fund of Philadelphia*, 10 Employee Benefits Cas. (BNA) 1608 (Arb. 1988) (considering the defense but rejecting it because of the employer's failure to demonstrate prejudice). Thus, a plan that is dilatory in assessing withdrawal liability and demanding payment risks losing the ability to collect the amount due.

Third, because delay in taking action to demand payment of withdrawal liability results in the loss of interest and potential inability to collect the withdrawal liability at all, plan trustees who fail to perform their statutory duty may invite claims for breach of fiduciary duty. *See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 571-83 (1985) (observing that "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled" and "create[s] a trustee responsibility for assuring full and prompt collection of contributions owed to the plan."); § 1382 (providing that "the plan sponsor . . . shall . . . (1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer.") Plan beneficiaries could sue procrastinating trustees under ERISA, seeking to recover for the fund the earnings the withdrawal funds could have generated for the beneficiaries had those funds been timely assessed, collected and invested.

Thus, the Ninth Circuit's practical concerns are fully met by statutory provisions quite separate from the limitations section, and those concerns provide no justification for applying that limitations section as the court below erroneously did.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act of 1974 (ERISA), as amended by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), provides in relevant part as follows:

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

. . . .

(3) by a participant, beneficiary, or fiduciary

(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or

(B) to obtain other appropriate equitable relief

(i) to redress such violations or

(ii) to enforce any provisions of this subchapter or the terms of the plan;

. . . .

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

. . . .

§ 1381. Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

§ 1382. Determination and collection of liability; notification of employer

When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with this part, shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b) Building and construction industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if—

(A) substantially all the employees with respect to whom the employer has an abligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan—

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this pargaraph.

(2) A withdrawal occurs under this paragraph if—

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer—

(i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or

(ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B) (ii).

(c) Entertainment industry

(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the entertainment industry, primarily on a temporary or project-by-project basis, if the plan primarily covers employees in the entertainment industry, a complete withdrawal occurs only as described in subsection (b)(2) of this section applied by substituting "plan" for "collective bargaining agreement" in subparagraph (B)(i) thereof.

(2) For purposes of this subsection, the term "entertainment industry" means—

(A) theater, motion picture (except to the extent provided in regulations prescribed by the corporation), radio, television, sound or visual recording, music, and dance, and

(B) such other entertainment activities as the corporation may determine to be appropriate.

(3) The corporation may by regulation exclude a group or class of employers described in the preceding sentence from the application of this subsection if the corporation determines that such exclusion is necessary—

(A) to protect the interest of the plan's participants and beneficiaries, or

(B) to prevent a significant risk of loss to the corporation with respect to the plan.

(4) A plan may be amended to provide that this subsection shall not apply to a group or class of employers under the plan.

(d) Other determinative factors

(1) Notwithstanding subsection (a) of this section, in the case of an employer who—

(A) has an obligation to contribute under a plan described in paragraph (2) primarily for work described in such paragraph, and

(B) does not continue to perform work within the jurisdiction of the plan,

a complete withdrawal occurs only as described in paragraph (3).

(2) A plan is described in this paragraph if substantially all of the contributions required under the plan are made by employers primar-

ily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry.

(3) A withdrawal occurs under this paragraph if—

(A) an employer permanently ceases to have an obligation to contribute under the plan or permanently ceases all covered operations under the plan, and

(B) either—

(i) the corporation determines that the plan has suffered substantial damage to its contribution base as a result of such cessation, or

(ii) the employer fails to furnish a bond issued by a corporate surety company that is an acceptable surety for purposes of section 1112 of this title, or an amount held in escrow by a bank or similar financial institution satisfactory to the plan, in an amount equal to 50 percent of the withdrawal liability of the employer.

(4) If, after an employer furnishes a bond or escrow to a plan under paragraph (3)(B)(ii), the corporation determines that the cessation of the employer's obligation to contribute under the plan (considered together with any cessations by other employers), or cessation of covered operations under the plan, has resulted in substantial damage to the contribution base of the plan, the employer shall be treated as having withdrawn from the plan on the date on which the obligation to contribute or covered operations ceased, and such bond or escrow shall

be paid to the plan. The corporation shall not make a determination under this paragraph more than 60 months after the date on which such obligation to contribute or covered operations ceased.

(5) If the corporation determines that the employer has no further liability under the plan either—

(A) because it determines that the contribution base of the plan has not suffered substantial damage as a result of the cessation of the employer's obligation to contribute or cessation of covered operations (considered together with any cessation of contribution obligation, or of covered operations, with respect to other employers), or

(B) because it may not make a determination under paragraph (4) because of the last sentence thereof,

then the bond shall be cancelled or the escrow refunded.

(6) Nothing in this subsection shall be construed as a limitation on the amount of the withdrawal liability of any employer.

(e) Date of complete withdrawal

For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

(f) Special liability withdrawal rules for industries other than construction and entertainment industries; procedures applicable to amend plans

(1) The corporation may prescribe regulations under which plans in industries other than the construction or entertainment industries may be amended to provide for special withdrawal liability rules similar to the rules described in subsections (b) and (c) of this section.

(2) Regulations under paragraph (1) shall permit use of special withdrawal liability rules—

(A) only in industries (or portions thereof) in which, as determined by the corporation, the characteristics that would make use of such rules appropriate are clearly shown, and

(B) only if the corporation determines, in each instance in which special withdrawal liability rules are permitted, that use of such rules will not pose a significant risk to the corporation under this subchapter.

§ 1391. Methods for computing withdrawal liability

(a) Determination of amount of unfunded vested benefits allocable to employer withdrawn from plan

The amount of the unfunded vested benefits allocable to an employer that withdraws from a plan shall be determined in accordance with subsection (b), (c), or (d) of this section.

(b) Factors determining computation of amount of unfunded vested benefits allocable to employer withdrawn from plan

(1) Except as provided in subsections (c) and (d) of this section, the amount of unfunded vested benefits allocable to an employer that withdraws is the sum of—

(A) the employer's proportional share of the unamortized amount of the change in

the plan's unfunded vested benefits for plan years ending after September 25, 1980, as determined under paragraph (2),

(B) the employer's proportional share, if any, of the unamortized amount of the plan's unfunded vested benefits at the end of the plan year ending before September 26, 1980, as determined under paragraph (3); and

(C) the employer's proportional share of the unamortized amounts of the reallocated unfunded vested benefits (if any) as determined under paragraph (4).

If the sums of the amounts determined with respect to an employer under paragraphs (2), (3), and (4) is negative, the unfunded vested benefits allocable to the employer shall be zero.

(2)(A) An employer's proportional share of the unamortized amount of the change in the plan's unfunded vested benefits for plan years ending after September 25, 1980, is the sum of the employer's proportional shares of the unamortized amount of the change in unfunded vested benefits for each plan year in which the employer has an obligation to contribute under the plan ending—

(i) after such date, and

(ii) before the plan year in which the withdrawal of the employer occurs.

(B) The change in a plan's unfunded vested benefits for a plan year is the amount by which—

(i) the unfunded vested benefits at the end of the plan year; exceeds

(ii) the sum of—

(I) the unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, and

(II) the sum of the unamortized amounts of the change in unfunded vested benefits foreach plan year ending after September 25, 1980, and preceding the plan year for which the change is determined.

(C) The unamortized amount of the change in a plan's unfunded vested benefits with respect to a plan year is the change in unfunded vested benefits for the plan year, reduced by 5 percent of such change for each succeeding plan year.

(D) The unamortized amount of the unfunded vested benefits for the last plan year ending before September 26, 1980, is the amount of the unfunded vested benefits as of the end of that plan year reduced by 5 percent of such amount for each succeeding plan year.

(E) An employer's proportional share of the unamortized amount of a change in unfunded vested benefits is the product of—

(i) the unamortized amount of such change (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) a fraction—

(I) the numerator of which is the sum of the contributions required to be made under the plan by the employer for the year in which such change arose and for the 4 preceding plan years, and

(II) the denominator of which is the sum for the plan year in which such change arose and the 4 preceding plan years of all contributions made by employers who had an obligation to contribute under the plan for the plan year in which such change arose reduced by the contributions made in such years by employers who had withdrawn from the plan in the year in which the change arose.

(3) An employer's proportional share of the unamortized amount of the plan's unfunded vested benefits for the last plan year ending before September 26, 1980, is the product of—

(A) such unamortized amount; multiplied by—

(B) a fraction—

(i) the numerator of which is the sum of all contributions required to be made by the employer under the plan for the most recent 5 plan years ending before September 26, 1980, and

(ii) the denominator of which is the sum of all contributions made for the most recent 5 plan years ending before September 26, 1980, by all employers—

(I) who had an obligation to contribute under the plan for the first plan year ending on or after such date, and

(II) who had not withdrawn from the plan before such date.

(4)(A) An employer's proportional share of the unamortized amount of the reallocated unfunded proportional shares of the unamortized amount of the reallocated unfunded vested benefits for each plan year ending before the plan year in which the employer withdrew from the plan.

(B) Except as otherwise provided in regulations prescribed by the corporation, the reallocated unfunded vested benefits for a plan year is the sum of—

(i) any amount which the plan sponsor determines in that plan year to be uncollectible for reasons arising out of cases or proceedings under Title 11, or similar proceedings.

(ii) any amount which the plan sponsor determines in that plan year will not be assessed as a result of the operation of section 1389, 1399(c)(1)(B), or section 1405 of this title against an employer to whom a notice described in section 1399 of this title has been sent, and

(iii) any amount which the plan sponsor determines to be uncollectible or unassessable in that plan year for other reasons under standards not inconsistent with regulations prescribed by the corporation.

(C) The unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the reallocated unfunded vested benefits for the plan year, reduced by 5 percent of such reallocated unfunded vested benefits for each succeeding plan year.

(D) An employer's proportional share of the unamortized amount of the reallocated unfunded vested benefits with respect to a plan year is the product of—

(i) the unamortized amount of the reallocated unfunded vested benefits (as of the end of the plan year preceding the plan year in which the employer withdraws); multiplied by

(ii) the fraction defined in paragraph (2)(E)(ii).

§ 1399. Notice, collection, etc., of withdrawal liability

(a) Furnishing of information by employer to plan sponsor

An employer shall, within 30 days after a written request from the plan sponsor, furnish such information as the plan sponsor reasonably determines to be necessary to enable the plan sponsor to comply with the requirements of this part.

(b) Notification, demand for payment, and review upon complete withdrawal by employer

(1) As soon as practicable after an employer's complete or partial withdrawal, the plan sponsor shall—

(A) notify the employer of—

(i) the amount of the liability, and

(ii) the schedule for liability payments, and

(B) demand payment in accordance with the schedule.

(2)(A) No later than 90 days after the employer receives the notice described in paragraph (1), the employer—

(i) may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments,

(ii) may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer, and

(iii) may furnish any additional relevant information to the plan sponsor.

(B) After a reasonable review of any matter raised, the plan sponsor shall notify the employer of—

(i) the plan sponsor's decision,

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

(c) Payment requirements; amount, etc.

(1)(A)(i) Except as provided in subparagraphs (B) and (D) of this paragraph and in paragraphs (4) and (5), an employer shall pay the amount determined under section 1391 of this title, adjusted if appropriate first under section 1389 and then under section 1386 of this title over the period of years necessary to amortize the amount in level annual payments determined under subparagraph (C) * * *. Actual payment shall commence in accordance with subparagraph (2).

(ii) The determination of the amortization period, described in clause (i) shall be based on the assmuptions used for the most recent actuarial valuation for the plan.

(B) In any case in which the amortization period described in subparagraph (A) exceeds 20 years, the employer's liability shall be limited to the first 20 annual payments determined under subparagraph (C).

. . . .

(2) Withdrawal liability shall be payable in accordance with the schedule set forth by the plan sponsor under subsection (b)(1) of this section beginning no later than 60 days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule.

(3) Each annual payment determined under paragraph (1)(C) shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules. If a payment is not made when due, interest on the payment shall accrue from the due date until the date on which the payment is made.

(4) The employer shall be entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments determined under paragraph (1)(C), plus accrued interest, if any, in whole or in part, without penalty. . . .

(5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, "default" means—

(A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and

(B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

§ 1401. Resolution of disputes

(a) Arbitration proceedings; matters subject to arbitration, procedures applicable, etc.

(1) Any dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under sections 1381 through 1399 of this title shall be resolved through arbitration. Either party may initiate the arbitration proceeding within a 60-day period after the earlier of—

(A) the date of notification to the employer under section 1399(b)(2)(B) of this title, or

(B) 120 days after the date of the employer's request under section 1399 (b)(2)(A) of this title.

The parties may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under section 1399(b) (1) of this title.

. . . .

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

. . . .

(d) Payments by employer prior to determination by arbitrator; adjustments; failure of employer to make payments

Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

§ 1451. Civil actions

(a) Persons entitled to maintain actions

(1) A plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief, or both.

. . . .

(b) Failure of employer to make timely withdrawal liability payment within prescribed time.

In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the prescribed time shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) Jurisdiction of Federal and State courts

The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

. . . .

(f) Time limitations

An action under this section may not be brought after the later of—

(1) 6 years after the date on which the cause of action arose, or

(2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

The regulations of the Pension Benefit Guaranty Corporation (PBGC) provide in relevant part as follows:

§ 4219.31 Overdue and defaulted withdrawal liability; overpayment.

(a) Overdue withdrawal liability payment. Except as otherwise provided in rules adopted by the plan in accordance with § 4219.33, a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor.

(b) Default.

(1) Except as provided in paragraph (c)(1), "default" means—

(i) The failure of an employer to pay any overdue withdrawal liability payment within 60 days after the employer receives written notification from the plan sponsor that the payment is overdue; and

(ii) Any other event described in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liabiilty.

(2) In the event of a default, a plan sponsor may require immediate payment of all or a portion of the outstanding amount of an employer's withdrawal liability, plus interest. In the event that the plan sponsor accelerates only a portion of the outstanding amount of an employer's withdrawal liability, the plan sponsor shall establish a new schedule of payments for the remaining amount of the employer's withdrawal liability.

(c) Plan review or arbitration of liability determination. The following rules shall apply with respect to the obligation to make withdrawal liability payments

during the period for plan review and arbitration and with respect to the failure to make such payments:

(1) A default as a result of failure to make any payments shall not occur until the 61st day after the last of—

(i) Expiration of the period described in section 4219(b)(2)(A) of ERISA;

(ii) If the employer requests review under section 4219(b)(2)(A) of ERISA of the plan's withdrawal liability determination or the schedule of payments established by the plan, expiration of the period described in section 4221(a)(1) of ERISA for initiation of arbitration; or

(iii) If arbitration is timely initiated either by the plan, the employer or both, issuance of the arbitrator's decision.

(2) Any amounts due before the expiration of the period described in paragraph (c)(1) shall be paid in accordance with the schedule established by the plan sponsor. If a payment is not made when due under the schedule, the payment is overdue and interest shall accrue in accordance with the rules and at the same rate set forth in § 4219.32.

(d) Overpayment. If the plan sponsor or an arbitrator determines that payments made in accordance with the schedule of payments established by the plan sponsor have resulted in an overpayment of withdrawal liability, the plan sponsor shall refund the overpayment, with interest, in a lump sum. The plan sponsor shall credit interest on the overpayment from the date of the overpayment to the date on which the overpayment is refunded to the employer at the same rate as the rate for overdue withdrawal liability pay-

ments, as established under § 4219.32 or by the plan pursuant to § 4219.33.

. . . .

29 C.F.R. § 4219.32 Interest on overdue, defaulted and overpaid withdrawal liability.

(a) Interest assessed. The plan sponsor of a multiemployer plan—

(1) Shall assess interest on overdue withdrawal liability payments from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e); and

(2) In the event of a default, may assess interest on any accelerated portion of the outstanding withdrawal liability from the due date, as defined in paragraph (d) of this section, until the date paid, as defined in paragraph (e).

. . . .

(d) Due date. Except as otherwise provided in rules adopted by the plan, the due date from which interest accrues shall be, for an overdue withdrawal liability payment and for an amount of withdrawal liability in default, the date of the missed payment that gave rise to the delinquency or the default.

(e) Date paid. Any amount of withdrawal liability shall be deemed to have been paid on the date on which it is received.

29 C.F.R. § 4219.33 Plan rules concerning overdue and defaulted withdrawal liability.

Plans may adopt rules relating to overdue and defaulted withdrawal liability, provided that those rules are consistent with ERISA. These rules may include, but are not limited to, rules for determining the rate of interest to be charged on overdue, defaulted and overpaid withdrawal liability (provided that the rate

reflects prevailing market rates for comparable obligations); rules providing reasonable grace periods during which late payments may be made without interest; additional definitions of default which indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability; and rules pertaining to acceleration of the outstanding balance on default. Plan rules adopted under this section shall be reasonable. Plan rules shall operate and be applied uniformly with respect to each employer, except that the rules may take into account the creditworthiness of an employer. Rules which take into account the creditworthiness of an employer shall state with particularity the categories of creditworthiness the plan will use, the specific differences in treatment accorded employers in different categories, and the standards and procedures for assigning an employer to a category.

No. 96-370

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In The

Supreme Court of the United States

October Term, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,

Petitioner,

vs.

FERBAR CORPORATION OF CALIFORNIA, INC., STEPHEN J. BARNES,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

When does the Multiemployer Pension Plan Amendments Act statute of limitations under 29 U.S.C. § 1451 begin to run to collect overdue employer withdrawal liability?

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COUNTER-STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").[1] Before the Court is a narrow issue of statutory interpretation: whether the MPPAA authorizes a Plan sponsor to file suit to collect withdrawal liability nearly eight years after the date of a complete withdrawal.

The MPPAA authorizes civil actions to enforce its various provisions and provides in pertinent part:

> (f) An action under the section may not be brought after the later of —
>
> (1) six years after the date on which the cause of action arose, or
>
> (2) three years after the earliest date on which the Plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action.

29 U.S.C. § 1451.

In the decision below, the court of appeals concluded that the Plan sponsor's action was time-barred. *Board of Trustees, Bay Area Laundry and Drycleaning Pension Trust Fund v. Ferbar Corporation*, 73 F.3d 971 (9th Cir. 1996). Pet. App. 5a. A unanimous Ninth Circuit Court of Appeal held that its prior decision in *Board of Trustees of the Construction Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), was controlling. In *Thibodo*, the Ninth Circuit held that, "For actions to recover withdrawal incurred as a result of complete withdrawal under 29 U.S.C. § 1383(b), the limitations period begins to run from the date that the conditions for withdrawal specified under that section are met." 34 F.3d at 916-917.

By contrast, the D.C. Circuit held that a plan's cause of action

---

1. Public Law No. 96-364, 94 Statute 1209 (1980) (codified as amended at 29 U.S.C. §§ 1381-1461) (1988).

for withdrawal liability does not arise until the employer fails to make a scheduled payment and thus triggers the running of the limitations period under the MPPAA. *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1122-1124 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). Moreover, the Seventh and the Third Circuits disagree as to whether the limitations period runs from the date of the first missed payment or whether there is a separate limitations period that runs from the date of each missed payment. *Cf. Central States Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167, 172 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994), with *Board of Trustees of the District No. 15, Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994).

In their briefs, Petitioner and the Solicitor General have both provided summaries of the statutory scheme. In our view, however, their treatments are unduly narrow and fail to explain the broader context in which the MPPAA's withdrawal liability provisions operate. We begin, therefore, with a discussion of the backdrop against which Congress legislated and a review of certain features of ERISA. We then explain why the statute of limitations ordinarily begins to run from the date of withdrawal, using the facts of this case to illustrate.

A. General Principles Of Withdrawal Liability.

One of the principal innovations of the MPPAA was to make an employer that withdraws from a multiemployer pension plan liable for a portion of the plan's unfunded vested benefits. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 725 (1984). The statutory scheme discourages employers from withdrawing from an underfunded plan by requiring the withdrawing employer to continue to make contributions to the plan even though its employees will not accrue additional plan benefits. 29 U.S.C. § 1381.

The MPPAA was created to solve the problem of employer flight from multiemployer pension plans after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Statutes 829, 29 U.S.C. § 1001, *et seq.* In *PBGC v. R.A. Gray & Co.*, this Court observed: "As the date for mandatory coverage of multiemployer pension plans approached, Congress became

concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity." 467 U.S. at 720-21. The MPPAA was designed to eliminate the incentives for withdrawal and to strengthen multiemployer plans so that employees and their beneficiaries would not be deprived of anticipated retirement benefits. *Id.* at 722-23.

In *Milwaukee Brewery Workers Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995), the Court explained that the MPPAA:

> [t]ransformed what was only a risk (that a withdrawing employer would have to pay a fair share of underfunding) into a certainty. That is to say, it imposed a withdrawal charge on all employers withdrawing from an underfunded plan (whether or not the plan later became insolvent). And, it set forth a detailed set of rules for determining, and collecting, that charge.

Id. at 417.

B. Withdrawal.

The statutory mechanism for accomplishing this goal is straightforward and is driven by one fundamental occurrence — the date of the employer's withdrawal. 29 U.S.C. § 1381(a) is titled "Withdrawal Liability Established" and it provides: "If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability."

A complete "withdrawal" occurs on the date when an employer either: (1) permanently ceases to have an obligation to contribute under the plan; or (2) permanently ceases all covered operations under the plan. 29 U.S.C. § 1383(a) and (e).

Respondent Ferbar Corporation (hereinafter "Respondent" or "Ferbar") owned three dry-cleaning facilities: Superior French Laundry, One Hour Martinizing, and Diablo Cleaners. Joint Appendix (J.A.) 19. Respondent Stephen Barnes was the principal

owner of Ferbar. Ferbar made contributions to the Bay Area Laundry and Dry Cleaning Pension Trust Fund ("Trust Fund") on behalf of employees working at these three facilities. J.A. 19. Ferbar ceased making contributions to the Pension Trust Fund on behalf of employees working at Diablo Cleaners in 1983. J.A. 19.

On March 1, 1985, Ferbar received a petition signed by employees working at Superior French Laundry and One Hour Martinizing stating that they no longer wanted to be represented by AFL-CIO Laundry and Dry Cleaning, Government And Industrial Services Local No. 3. J.A. 19. Ferbar made no contributions to the Pension Trust Fund on behalf of employees working at Superior French Laundry or One Hour Martinizing after March 1985.[2] J.A. 20. After March 1985, the Trust Fund stopped receiving monthly statements and contributions from Ferbar.

C. Initiation Of Collection Proceedings.

The statutory procedure for collection of this liability is also straightforward. 29 U.S.C. § 1382 provides:

> When an employer withdraws from a multiemployer plan, the plan sponsor, in accordance with his part, shall —
>
> (1) determine the amount of the employer's withdrawal liability,
>
> (2) notify the employer of the amount of the withdrawal liability, and
>
> (3) collect the amount of the withdrawal liability from the employer.

Inasmuch as the continuing solvency and the continuing growth of multiemployer pension plans were the guiding purposes in the passage of the MPPAA, a number of strict timelines were incorporated into the statute's collection procedures. First and foremost, the fundamental statutory requirement for plan sponsors under the MPPAA is to send a notice and demand for payment to the employer for withdrawal liability "as soon as practicable after

2. It is interesting to note that if the Trust Fund had drawn up the schedule of payment, and demanded payment, "as soon as practicable" after Ferbar's withdrawal, Ferbar's first withdrawal liability payment would have been due on June 1, 1985. 29 U.S.C. §§ 1399(b)(1), 1399(c)(2); *Joseph Schlitz, supra,* 513 U.S. at 419-420.

the employer's complete or partial withdrawal". 29 U.S.C. § 1399(b)(1). Due to Congress' concern about the continued solvency of these pension plans, the directive to act with all due speed is completely logical. This command that plan sponsors demand payment "as soon as practicable" after withdrawal is the very first order Congress gave plan sponsors in the statutory framework for collecting withdrawal liability. *Id.* ("Congress told the trustees of pension funds not to tarry in assessing and collecting [withdrawal] liability.") *Navco, supra,* 3 F.3d at 172.

However, in the instant case, it was not until almost two years after its withdrawal, on December 12, 1986, that the Board of Trustees of the Pension Trust Fund ("Petitioner" or "Board of Trustees") sent a letter to Superior French Laundry titled: "Withdrawal Liability Assessment and Demand for Payment." This letter began as follows:

> Gentlemen:
>
> Our records indicate that you have not contributed to the Bay Area Laundry and Dry Cleaning Pension Fund since March 1985.
>
> Based upon this information, we conclude that you have withdrawn from the Plan. Accordingly, you are subject to the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act of 1980, a federal enactment amending the Employee Retirement Income Security Act of 1974 (ERISA) . . .

The letter stated that Superior French had a withdrawal liability assessment of $45,570.80. Superior French Laundry was advised that it had two options: (1) it could pay the entire withdrawal liability in a single lump sum payment within sixty (60) days; or (2) it could pay off its withdrawal liability by making monthly installment payments of $345.50 for the next twenty (20) years. Superior French Laundry was told that if it opted to make monthly payments, its first payment would be due on or before February 1, 1987. Superior French Laundry was warned that, if it failed to make any monthly payment (plus interest) within sixty (60) days after receiving notice from the Plan, that the payment would be considered delinquent and the Board of Trustees could then deem Superior French Laundry

to be in default and liable for the entire amount of the withdrawal liability from the due date of the first late payment. Superior French Laundry was also advised it had ninety (90) days to request that the Trustees review any matter relating to the determination of the Company's withdrawal liability and payment schedule, to identify any claimed inaccuracy and to furnish the Trustees with any relevant information. The Plan promised to review any matter raised by Ferbar and to notify the Company of the Plan's decision and the basis for the decision. J.A. 23-26.

D. Payment Of Withdrawal Liability.

In *Jos. Schlitz Brewing Co.*, the Court answered the question as to when an employer must pay withdrawal liability:

> [t]he statute says that a plan must draw up a schedule for payment and "demand payment" as "soon as practicable" after withdrawal. 29 U.S.C. § 1399(b)(1).
>
> It adds that: '[w]ithdrawal liability shall be payable . . . no more than sixty days after the date of the demand.' 29 U.S.C. § 1399(c)(2).

513 U.S. at 419-420.

Section 1399 commands the employer to make withdrawal liability payments in accordance with the schedule "beginning no later than sixty days after the date of the demand notwithstanding any request for review or appeal of determinations of the amount of such liability or of the schedule." 29 U.S.C. § 1399(c)(2). Neither Ferbar Corporation nor Superior French Laundry has ever made any withdrawal liability payment to the Pension Trust Fund. J.A. 20.

Requiring employers to make withdrawal liability payments "up front" is consistent with MPPAA's stated goal of protecting the solvency of multiemployer pension plans. *R.A. Gray*, 467 U.S. at 722-23. The purpose of § 1399(c)(2) is directly aimed at protecting the stability and solvency of the pension plan and to cushion the economic shock to the other participating employers created by the sudden withdrawal of an employer. The "pay now, dispute later" feature of the MPPAA functions to preserve plan cash flow and to thwart the use of dilatory tactics by employers.

Robbins v. Pepsi-Cola Metropolitan Bottling Co., 800 F.2d 641, 642 (7th Cir. 1986).

During a sixty-day window of opportunity, a withdrawing employer is entitled to prepay the outstanding amount of the unpaid annual withdrawal liability payments, plus accrued interest, if any, without penalty. 29 U.S.C. § 1399(c)(4).[3]

E. Request For Review.

After an employer receives the withdrawal liability assessment notice, 29 U.S.C. § 1399(b)(2)(A) permits the employer to request a review of the initial withdrawal liability determination. In its request for review, the employer may ask the plan sponsor to review any specific matter relating to the determination of the employer's liability and the schedule of payments; may identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer; and may furnish any additional relevant information the employer possesses that could lead the plan sponsor to a reassessment or recalculation of the determination. *Id.*

Superior French Laundry submitted a request for review of its assessed withdrawal liability by letter of February 27, 1987. In that letter, the employer asked to have the Trustees review their determination of withdrawal liability, as the Company believed that no liability could be imposed for the various reasons set forth in the letter the reasons included the fact that, as there was no signed written agreement upon which the requirement to contribute was based, the Employer was not obligated to make any contributions. Superior French also claimed that there were inaccuracies in the Trustees' calculation of the withdrawal liability. Finally, in the alternative, the Company asked that the Trust Fund provide it with a report of all calculations it made, and the assumptions it utilized in determining the unfunded vested benefits and the employer's withdrawal liability. J.A. 31-34.

29 U.S.C. § 1399(b)(2)(B) is the next statutory event. It provides:

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3. In *Joseph Schlitz*, Schlitz withdrew on August 14, 1981, and by the end of September 1981, the plan had completed its withdrawal liability calculations, created a payment schedule, and had sent out a demand for payment (thereby making the first payment payable on or before November 1, 1981). *Id.*

After a reasonable review of any matter raised, the plan sponsor shall notify the employer of

(i) the plan sponsor's decision

(ii) the basis for the decision, and

(iii) the reason for any change in the determination of the employer's liability or schedule of liability payments.

There is no time limit on the plan's response, but if the plan sponsor fails to reply within 120 days, the employer is then free to arbitrate the plan's determination pursuant to 29 U.S.C. § 1401(a)(1)(B). The Trust Fund herein never responded to the employer's request for review. J.A. 38.

F. Acceleration.

The statutory scheme next provides that if the employer fails to make, when due, any payment and then fails to cure this failure to pay within sixty days after receiving written notice from the plan sponsor of such failure, then the "plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. § 1399(c)(5).

The Pension Trust Fund next sent Superior French Laundry a letter dated April 14, 1987, advising that since more than sixty (60) days had elapsed from the date of the withdrawal liability assessment letter of December 12, 1986, and since the Trust Fund had no response from the Company, Superior French Laundry was advised of its status as a Delinquent Withdrawn Employer. The letter from the Trust Fund further stated that the failure to make the necessary payment within sixty (60) days would cause the Company to become a "Defaulted Withdrawn Employer", which permits the Board of Trustees to insist upon immediate payment of the entire outstanding amount of withdrawal liability. J.A. 35-36. The Trust Fund advised Ferbar in this letter: "You are required by ERISA to make the necessary payments notwithstanding any request you

may make for review or appeal of the determination of the amount of your liability or schedule of payments." J.A. 36.[4]

G. Initiation Of Arbitration.

Where a dispute exists, either party may initiate arbitration within specified time periods. 29 U.S.C. § 1401(a)(1). If the employer fails to timely initiate arbitration, it waives both its right to dispute the amount of its withdrawal liability and its right to assert defenses. 29 U.S.C. § 1401(b)(1). During the pendency of an arbitration, the employer is obliged to continue making withdrawal liability payments in accordance with the plan sponsor's schedule. 29 U.S.C. § 1401(d). *Carriers Container Council, Inc. v. Mobile Steamship Assoc., Inc.*, 904 F.2d 28 (11th Cir. 1990), *cert. denied*, 498 U.S. 926 (1990). The PBGC has published regulations that establish strict timelines and procedures for MPPAA arbitrations. *See* 29 C.F.R. § 4221.1 – 4221.14.

On July 8, 1987, Superior French Laundry submitted a Notice of Initiation of Arbitration concerning its withdrawal liability, and asked that the Fund contact the Company's attorneys so that they could begin the process of selecting an arbitrator. J.A. 37-38. The Notice of Initiation of Arbitration noted that the employer received no response from the pension fund to its request for review. J.A. 38. However, no arbitration proceedings were commenced. J.A. 29.

Again, if no arbitration proceeding has been initiated, the withdrawal liability amounts are deemed due and owing on the schedule set forth by the plan sponsor. 29 U.S.C. § 1401(b)(1). The plan sponsor is given the right to bring an action in state or federal court to collect the withdrawal liability. *Id.*

H. Filing Of Lawsuit.

29 U.S.C. § 1451 permits a Trust Fund to sue for collection of withdrawal liability. Petitioner did so in the instant case on February 9, 1993. The Trustees sued for the total amount of unpaid

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4. It is noteworthy that the Trust Fund ignored the Company's timely request for review sent on February 27, 1987, and erroneously stated that "we have no response from you." (J.A. 35.)

withdrawal liability payments (First, Second and Third Claims). J.A. 8-11. The Trust Fund also sued for $25,375: "[b]eing the amount of the delinquent monthly installment payments from February, 1987 to the date of filing of this action, and the sum of $345.50 each month thereafter . . ." (Fourth Claim). J.A. 11, 12.

I. Proceedings Below.

The parties filed cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the United States District Court for the Northern District of California entered judgment in favor of Ferbar. Pet. App. 6a-19a.

The United States Court of Appeals for the Ninth Circuit issued a per curiam decision on January 17, 1996 sustaining the judgment of the District Court. On May 13, 1996, the Ninth Circuit issued an Order denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. No judge of the court requested a vote on the suggestion for rehearing en banc. Pet. App. 20a.

SUMMARY OF ARGUMENT

A. This case ultimately asks the Court to answer a very straightforward question: Do withdrawal liability disputes ever end? Respondents will demonstrate below that the statute of limitations found at 29 U.S.C. § 1451(f) answers this question with a resounding "yes"! In order for such disputes to end within a reasonable time, however, the cause of action must be deemed to arise on the date of withdrawal.

Under Petitioner's theory, on the other hand, these disputes may not end because withdrawal liability claims do not "accrue" until three preconditions are met: (1) the Trust Fund calculates the amount of the employer's withdrawal liability; (2) the Trust Fund notifies the employer of this assessment; and (3) the Employer fails to pay and then fails to cure the default within sixty (60) days. Petitioner argues that if any of these preconditions are not met, the statute of limitations does not begin to run.

Respondents assert that applying these preconditions to the running of the limitations period is unnecessary and contrary to

the plain language of 29 U.S.C. § 1451, the purposes of ERISA, and common sense. The three or six-year statute of limitations found at 29 U.S.C. §§ 1451(f)(1) and (2) have a plain and unambiguous meaning with regard to the dispute presented here — Petitioner knew in March 1985 that Ferbar had completely withdrawn but waited until February 1993 to file suit to enforce its rights. It knew of the existence of the cause of action in March 1985 when it arose, and the statutory language requires that the Trust Fund's cause of action begins to run from that time.

Adoption of the Board of Trustees' view on the accrual of the cause of action and the commencement of the running of the statute of limitations in Multiemployer Pension Plan Amendment Act cases — not until the amount of liability and the payment schedule are imposed and a payment is missed — would also turn the long-standing principles enunciated by the Court concerning statute of limitations on their head. It would abrogate the clear language of the statute that a fiduciary may bring an action whenever it is adversely affected by an act or omission of any party. 29 U.S.C. § 1451(a). The "act or omission" that is the focus of the MPPAA is an employer's "withdrawal." The very first section of the statute, 29 U.S.C. § 1381(a), describes "withdrawal liability" as the harm the statute is aimed at preventing. The harm arises when an employer withdraws and thereby economically injures the underfunded multiemployer pension plan by saddling the pension plan with unpaid-for pension liabilities. The fact that the trust fund must first calculate the amount of the harm and demand payment prior to filing suit does not mean the harm has not yet occurred. Certainly, a trust fund is adversely affected when an employer withdraws as it ceases making monthly contributions which go to fund vested benefits and to reduce unfunded benefits. The Trust Fund was injured when Ferbar stopped making contributions to the Plan. The fact that this economic injury continued for almost two years before the Trust Fund got around to calculating the amount of Ferbar's withdrawal liability and demanding payment does not change this fundamental fact.

Petitioner's view would give total control to plaintiffs in determining the commencement of the statute of limitations, and

would subject defendant employers indefinitely to withdrawal liability actions. A plaintiff should not be able to postpone indefinitely the commencement of the running of the statute of limitations. Trust funds could literally sit on their rights for many years without starting the withdrawal liability collection process. Uncertainty would reign as employers would never know when they could be hit with withdrawal liability assessments which often are of immense financial magnitude. By permitting the arbitrary reconfiguration of the statute of limitations to benefit the Trust Funds, the Court would extract from the statute the very thing for which statutes of limitation were devised — certainty. If the statute does not begin to run until a trust fund gets around to calculating and imposing liability and a demanded payment is not made, the goal of the Act to protect the solvency of multiemployer pension plans would be rendered a nullity.

The six years provided in § 1451(f) is clearly a long time. Moreover, the very first command that Congress gave plan sponsors in the MPPAA was that they notify the employer of the amount of the schedule and set forth a demand for withdrawal liability payment "as soon as practicable" after the withdrawal. 29 U.S.C. § 1399(b)(1).

Although Petitioner ignores the portion of the statute dealing with the time a party knows or should have known of the existence of the cause of action, the methodology of requiring plaintiffs to protect their rights once they "know or should have known" of the injury giving rise to the harm is found in the text of § 1451 and is used in other causes of action arising under ERISA. Section 1451(f) provides that a suit must be brought after the *later* of six years from the date on which the cause of action arose or three years after "the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." Thus, the plain text of § 1451(f)(2) gives meaning to when the statute of limitations begins to run under § 1451. When a plaintiff knows it has a cause of action as of a date certain, as was the case here, § 1451(f)(2) generally serves to start the running of the three-year statutory clock at that time. If knowledge of the cause of action is acquired, as in the instant case, within three years from the time the cause of action arises, the time to bring suit is extended under

§ 1451(f)(1) to six years from the time the cause of action arose. Where the statutory language "has a plain and unambiguous meaning" as here, and where the "statutory scheme is coherent and consistent," this Court's inquiry must end. *Robinson v. Shell Oil Company*, __ U.S. __, 117 S. Ct. 843, 846 (1997).

Under Petitioner's interpretation, 29 U.S.C. § 1451(f)(2) would be rendered meaningless in most withdrawal liability collection cases. It is implausible to believe that Congress intended to have one of the two prongs of the statute of limitation for withdrawal liability rendered null and void for the overwhelming number of withdrawal liability cases. The statutory language nowhere suggests a purpose to swallow up the three-year and six-year § 1451(f)(2) limitations so as to render them meaningless for withdrawal liability purposes.

This "knew or should have known" methodology is repeated throughout ERISA's enforcement provisions. Thus, even if this Court should find the language of § 1451(f) ambiguous, the meaning proposed by Respondents is most in accord with its statutory context and the ordinary usage of the language, and it is most compatible with the surrounding body of law into which the provision must be integrated.

Moreover, participants, beneficiaries and employers would be left without a remedy if they seek to enforce their rights under § 1451. Such persons could never sue to compel trustees to commence an enforcement action, as they would always be met with the position that the cause of action had not yet accrued because withdrawal liability no missed payment had yet occurred.

Respondents will also show that the statute effectively creates two separate statutes of limitations for two different types of withdrawal liability obligations. 29 U.S.C. § 1451(f) permits a trust fund to file its suit for withdrawal liability within three or six years. 29 U.S.C. § 1451(b) simply provides that once an employer begins making withdrawal liability payments but then ceases, the trust fund can enforce the employer's installment payment obligation by bringing a collection action in accordance with 29 U.S.C. § 1145. Hence, there is no validity to the Petitioner's contention that installments unpaid six years from withdrawal would be uncollectible.

B. Petitioner and the Solicitor General also argue that each of the payments found in the Plan Sponsors' 20-year withdrawal liability schedule itself contains its own 6-year statute of limitations. There is, of course, nothing in the plain language of § 1451(f) nor in MPPAA's legislative history that hints at this interpretation. More importantly, according to the Trust Fund's limitation theory, the 20-year statutory payment schedule would give the Trust Fund 26 years from the date of the first missed payment before it had to sue on the last missed payment. As Judge Easterbrook observed in *Navco*, 3 F.3d at 172: "Turning six years into twenty-six years is a job best left to magicians." Petitioner's interpretation would require no less than a wholesale rewriting of § 1451 to incorporate selected provisions of § 1399. There is no mention of this borrowing requirement nor of the 20-year recovery period in 29 U.S.C. § 1451. To insert this requirement in § 1451 would wreak a kind of linguistic havoc.

Petitioner's assertion that the statute of limitations runs *seriatim* from the date of each missed payment is mistaken. The application of Petitioner's "continuing violation" theory founders on the plain language of 29 U.S.C. § 1451(f)(2). If the "continuing violation" theory (which gives rise to the 26-year limitations period) is as broad as Petitioner suggests, the "actual knowledge" provision in § 1451(f)(2) would be rendered superfluous and no withdrawal would ever grow stale so long as it remained unremedied. Obviously, Ferbar did not accept the Trust Funds' offer to make monthly payments, and, notwithstanding Petitioner's hyperbole, the underlying obligation cannot properly be termed a loan or installment obligation. Petitioner's analogies to the law of commercial contracts are misplaced as Respondents never agreed to the process by making any payments.

Petitioner's 26-year statute of limitations argument is based on a false premise. Although Petitioner asserts that the statute "commands" payment according to this 20-year schedule, its own acts and words belie this contention. J.A. 24-25, 35. What the statute does command is that the Trust Fund inform the withdrawing employer that the employer be given a choice to either pay the entire amount in one lump sum or pay the withdrawal liability amount according to a schedule. *See* 29 U.S.C. § 1399(c)(4).

Importantly, Petitioner chose to accelerate the debt when it filed suit here.

Petitioner's interpretation would upset the balance between ERISA's regulation of benefit plans and the costs of compliance. There is, of course, a tension between the primary ERISA goal of benefiting employees and the subsidiary goal of containing pension costs. Petitioner's borrowing of selected parts of § 1399 to extend the limitations period for up to 26 years would effectively establish a new remedy that Congress did not expressly provide.

Petitioner has thrown down the gauntlet of "as soon as practicable" as the statute's enforcement mechanism, without hinting at what it means. Without any reliable yardstick to measure "practicable," virtually all withdrawal liability assessments would be placed in dispute. Moreover, Petitioner's proposed enforcement mechanism is impractical, would invite more litigation and would provide no meaningful remedy for harmed participants.

ARGUMENT

I. THE CAUSE OF ACTION ARISES ON THE DATE OF WITHDRAWAL, AND A COLLECTION LAWSUIT CANNOT BE BROUGHT AFTER THE LATER OF SIX YEARS FROM THE TIME THE CAUSE OF ACTION AROSE OR THREE YEARS AFTER THE TRUST FUND ACQUIRES KNOWLEDGE OF THE EXISTENCE OF THE CAUSE OF ACTION.

In *Board of Trustees of the Construction Laborers Pension Trust v. Thibodo*, the Ninth Circuit held that the limitations period of § 1451(f) begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met. *Thibodo*, 34 F.3d at 917. The court noted that its approach differed from that of the D.C. Circuit which did not allow the statute of limitations to commence running until there was an unmet demand for payment. The court said that "that approach improperly places the running of the limitations period in the control of the plaintiff." *Id.* at 917. The court pointed out that, theoretically, the statute of limitations might not be triggered for many years should it be left in the control of plaintiff. Moreover, it reasoned that there would be little reason for § 1451(f)(2), if the cause

of action did not come into existence until the demand for payment was made and refused. *Id.* at 918.

While *Thibodo* involved the construction industry, its principle concerning commencement of the running of the statute was adhered to in the Ninth Circuit's decision below. The Ninth Circuit held that the limitations period begins to run on the date of complete withdrawal. Pet. App. 25a-26a.

A. The Statute Expressly Provides That A Fiduciary May Bring An Action Whenever It Is Adversely Affected By An Act Or Omission Of Any Party, And Trust Funds Are Harmed By Failure Of Withdrawn Employers To Make Their Monthly Contributions.

The provisions of the Multiemployer Pension Plan Amendments Act setting forth the statute of limitations cannot be any clearer — fiduciaries can bring an action whenever they are adversely affected by an act or omission of any party. 29 U.S.C. § 1451(a).

It cannot reasonably be controverted that a trust fund is adversely affected when an employer withdraws and thereby ceases making its pension contributions to the fund. That cessation determines when a fund is adversely affected in the first instance, not when a payment has been missed. It is at that point that a fund suffers clear financial detriment — less money to fund vested benefits and to reduce underfunding is flowing in.

The harm arises when an employer withdraws and thereby economically injures the underfunded multiemployer pension plan by saddling the pension plan with unpaid-for pension liabilities. The fact that the trust fund must first calculate the amount of the harm and demand payment prior to filing suit does not mean the harm has not yet occurred.

Under the Board of Trustees' approach, a trust fund could delay, and effectively deny the existence of, withdrawal liability for an unlimited period of time — until it got around to assessing liability and demanding payment. It waited almost two years in the instant case. Was not the Fund adversely affected by then? Would not the underfunding problem be made more acute by the withdrawing employer's failure to contribute? Petitioner cannot plausibly argue

that a fund would not be harmed if it waited six, ten or twenty years. Yet, under its theory no cause of action would accrue (and it purportedly would not be adversely affected) if it waited until that time to demand payment.

The Board of Trustees contends that a right of action would not be complete on the date of withdrawal so the limitations period could not begin to run at that time. It argues that the amount of liability would not yet be calculated or a demand for payment made, and hence a suit to collect liability could not be maintained. Ferbar submits, first of all, that § 1451 states that a fiduciary which is adversely affected by an act or omission of another party may bring an action, and thus a fund could do so at the time of withdrawal as it is adversely affected at that point.

In *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953), the Court interpreted the Portal to Portal Act's two-year statute of limitations to mean that a cause of action accrued for liquidated damages from an employer employing child labor when the minors were actually employed, not when it was administratively determined that the employer was liable for such damages. The failure to pay the minor caused the harm irrespective of the fact that it had not yet been administratively determined that the employer was liable. The Court said:

> The fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings before the Secretary of Labor have been completed, [citations], is a matter of judicial administration and of no relevancy here.

Unexcelled Chemical Corp., 345 U.S. at 66.

Likewise, under the Multiemployer Pension Plan Amendments Act, the time of actual withdrawal should determine the accrual of the cause of action, and not the time when the employer fails to meet an actual assessed liability payment. The withdrawal causes the cessation of the contribution flow to the fund thereby causing it to be adversely affected. The fact that a court may have to stay its hand until the administrative procedure under the Act is completed is a matter of judicial administration, and does not trump the reality that a fund is adversely affected when an employer's contributions cease.

The Board of Trustees argues that a limitations period accrues only when the right of action is complete, that is, when it has accrued in a shape to be effectively enforced. Petitioner's Brief, 14. It then cites *Amy v. Dubuque*, 98 U.S. 470, 474 (1879) and *Wilcox v. Executors of Plummer*, 29 U.S. 172, 181 (1830), for the correct proposition that the statute of limitations begins to run from the time the action first could have been instituted. Section 1451(a) clearly determines that time for purpose of the instant case — the action could have been instituted from the time that the trustees were adversely affected by an act or omission of a party, *i.e.* when an employer withdraws.

Both Petitioner and the Solicitor General rely heavily on *Rawlings v. Ray*, 312 U.S. 96 (1941),[5] which held that the cause of action was not complete and present at the date of assessment of liability but until the date fixed for payment. However, in *Rawlings*, while the applicable state statute of limitations spoke in terms of accrual of a cause of action, the federal statute on which the liability was based did not expressly set forth when a suit to enforce the liability could be brought (unlike the statute at issue). In the instant case, § 1451 expressly states that a fiduciary can bring an action when it is adversely affected.

The Board of Trustees maintains that until there is some act or omission by the employer contrary to some statutorily-imposed

5. Both Petitioner and the Solicitor General also rely on *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). *Crown Coat* is inapposite. It held that under the statute at issue, the statute of limitations accrued at the time of final administrative action. There is no similar administrative action contained in the instant statute, and, in any event, under the ERISA benefit claims statute, 29 U.S.C. § 1132(a)(a)(B), the cause of action accrues when the claim for benefits is denied, not when the administrative review process has been completed. *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501 (9th Cir. 1984). Likewise, *United States v. Wurts*, 303 U.S. 414 (1938), is cited by Petitioner for the proposition that the right of action is complete when it has accrued in a shape to be effectively enforced. Respondents submit that the right to recover withdrawal liability may be effectively enforced at the time of withdrawal as, under § 1451(a), the fund is adversely affected as of that time. Moreover, it clearly may be enforced once the fund becomes aware of the withdrawal — all that the fund has to do is calculate the liability, give notice to the employer and make a demand.

obligation, no injury to the Plan occurs and no suit can be filed.[6] Petitioner's Brief, 15. Ferbar again submits that a plan is adversely affected by the mere act of withdrawal. 29 U.S.C. § 1381(a). While it is correct that an employer owes nothing until its plan demands payment, that is not the controlling factor for cases under the MPPAA as to when the cause of action accrues. The governing factor must be when the rights of the plan's participants and beneficiaries are adversely affected.[7] That is when the statute declares the right of fiduciaries to maintain a suit arises and that is when the cause of action accrues. The statute places the burden on the trustees on the trustees to take the necessary steps "as soon as practicable after an employer's complete or partial withdrawal" to enforce collection. 29 U.S.C. § 1399(b)(1). This statutory obligation is in furtherance of one of the MPPAA's goals which is to maintain level funding for the plan. *Jos. Schlitz*, 513 U.S. 419.

In *Unexcelled Chemical*, 345 U.S. at 66, the Court held that the statutory liability accrued when the minors were employed and not paid, and it was from that date that the period of limitations began to run. Although Petitioner argues that it would not be clear prior to the time that a fund gives notice of the imposition of withdrawal liability what the amount of withdrawal liability is or if withdrawal liability is even owed, the same could be said of the situation in *Unexcelled Chemical*. An employer may not know whether an employee is covered under the Portal-to-Portal Act or whether it has an obligation to pay pursuant to that Act. Moreover, the amount that should be owing is not clear at the point that an employee is not paid the proper amount. Just as the cause of action would accrue in that situation at the time when the employee was not paid, and not until the time an administrative determination that the employer is liable is made, so under the MPPAA should

6. It should be noted that in *Joyce*, a case heavily relied on by Petitioner, the Trust Fund sued for the entire amount of withdrawal liability on the same day it sent notice to the employer of its withdrawal liability and payment schedule. *Joyce*, 871 F.2d at 1121.

7. "[I]f an employer withdraws from a . . . multi-employer plan, it incurs 'withdrawal liability' in the form of a fixed and certain debt to the pension plan." *R.A. Gray & Co.*, 476 U.S. at 725. *Concrete Pipe & Products v. Construction Laborers Pension Trust For S. Calif.*, 508 U.S. 602 (1993).

the cause of action at the very latest accrue on the date the Trust Fund knows or should have known of the withdrawal, even though the precise amount of the debt may not have been administratively determined.

B. The Adoption Of Petitioner's Position Would Allow Trust Funds To Be In Absolute Control Of The Commencement Of The Running Of The Statute Of Limitations, And The Goal Of Certainty, Which Statutes Of Limitations Are Created To Establish, Would Be Vitiated.

A plaintiff should not be able to postpone indefinitely the commencement of the running of the statute of limitations. *McMahon v. United States*, 342 U.S. 25, 27, *rehearing denied*, 342 U.S. 899 (1951). An interpretation of a statute purporting to set a definite limitation on the time of bringing an action which leaves defendants subject indefinitely to legal actions would defeat its obvious purpose. *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926). The very purpose of a period of limitation is that there may be, at some definitely ascertained period, an end to litigation. *Reading Co. v. Koons*, 271 U.S. at 65.

Ferbar legally ceased making contributions to the Pension Trust Fund in March 1985 thereby clearly withdrawing from the Plan. 29 U.S.C. § 1383(e). The Board of Trustees waited almost two years, until December 1986, to issue a notice of assessment of withdrawal liability. In the initial withdrawal liability assessment demand letter, the Trust identified March 1985 as the date of Ferbar's withdrawal. J.A. 23. The Board ignored and did not respond to Ferbar's timely request for review of the determination and calculation of withdrawal liability and request for documentary information. It then ignored Ferbar's timely Initiation of Arbitration of the dispute. Although Ferbar failed to make its first scheduled liability payment on February 1, 1987, and made no payment thereafter, the Board of Trustees did not move to file suit for collection until February 9, 1993, almost eight years from the date of withdrawal.

The Board of Trustees should not be rewarded for sitting on its legal rights and now be permitted to collect withdrawal liability through an interpretation of the statute that gives it the unfettered

discretion when to commence the assessment/collection process. The plain meaning of the governing statute, 29 U.S.C. § 1451(a), should be recognized — Plan trustees may bring suit when a plan is adversely affected, and that occurs at the time of withdrawal when the obligation to contribute permanently ceases.

This Court long ago enunciated the basic principles that

> The statute of limitations is emphatically termed a statute of repose; it is made for the purpose of quieting rights and shutting out stale and fraudulent claims. It has, therefore, always been construed strictly against the plaintiff, and no case has been excepted from its operation, unless within the strict letter or manifest equity of some exception in the act itself. *Shipp et al. v. Miller's Heirs*, 2 Wheat. 316, 324 (1817).
>
> Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitations and that the right to be free of state claims in time comes to prevail over the right to prosecute them." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349, 64 S. Ct. 582, 586, 88 L. Ed. 788. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.

Burnett v. New York Central Railroad Company, 380 U.S. 424, 428 (1965); *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *Chase Securities Corporation v. Donaldson*, 325 U.S. 304, 314 (1945).

Employers would be left completely at the mercy of the whims of trust fund trustees, and unable to plan their financial futures, if the trustees, at their absolute discretion, could decide when to assess withdrawal liability, and demand and enforce payment. Despite Petitioner's claim that trustees would, of course, work to promptly

assess liability and enforce collection, there can be no guarantee that they would do so unless there were some overarching direction that would so compel them.

In *Reading Co. v. Koons*, the issue was whether a cause of action accrued at the date of death or when an administrator was appointed. In determining that it should run from the time of death, the Court reasoned that the time might have been extended indefinitely by the failure to apply for administration. *Reading Co. v. Koons*, 271 U.S. at 64.

Under the Board of Trustees' view there would be no legal bar to prevent a fund from waiting for, say, twenty years and then demanding payment. It could in fact even go up to twenty-six years and then attempt to recover whatever amount of payment it could. The Trustees would actually countenance the loss of numerous years of collection by a fund which failed to act in a timely fashion and instead delayed imposing the assessment and recovering the payments. Adoption of Petitioners standard would reward sloth and inadvertence.

The Board of Trustees slept on its rights in this case. It ignored the Employer's request for review and for arbitration. It made a dilatory attempt to assess and collect liability, waiting almost eight years from the time of withdrawal to commence suit. The Board is now attempting to institutionalize an interpretation of 29 U.S.C. § 1451 that would give it and other trust funds the power to utterly ignore the valid requests of employers for review of assessments and to commence the running of the statute at their total discretion. Only by recognizing Congress' clear language that a fiduciary can bring suit when it has been adversely affected, *i.e.* at the time of withdrawal, can pressure be brought on funds to act with dispatch and with fairness in collecting sums intended for beneficiaries.

Moreover, withdrawn employers would never be able to plan their business and financial futures with any degree of certainty if they never could be certain if they would be assessed withdrawal liability, what the amount of that liability might be and when they might be required to pay that amount. They would be subject to a timetable for the collection of withdrawal liability left to the absolute discretion of fund trustees. This total uncertainty as to whether or

when enforcement of liability might be made against them is just the sort of uncertainty that statutes of limitation are designed to prevent.

C. Petitioner's View Would Allow Trust Funds To Control And Delay The Recovery Of Withdrawal Liability Amounts In Derogation Of The Statute's Goal Of Maintaining Solvency Of Trust Funds And The Congressional Directive To Act As Soon As Practicable.

The six years provided in § 1451 is clearly a long time.[8] Certainly trust funds should be able to make the necessary withdrawal liability calculations and provide a schedule of payments to the withdrawn employer well within that time frame. In fact, Congress has exhorted trust funds to act rapidly by mandating that they notify the employer of the amount of liability and the schedule of payments and demand payment "as soon as practicable after an employer's complete or partial withdrawal." 29 U.S.C. § 1399(b)(1).

Allowing trustees to delay their assessment and collection efforts would be in derogation of the acknowledged important goal of the MPPAA of maintaining the solvency of multiemployer trust funds, *R.A. Gray & Co.*, 467 U.S. at 720-25, and a fund's dilatoriness could cause its solvency to be jeopardized. Moreover, such delays by trustees would certainly not be in the best interests of the fund beneficiaries.

The concept of withdrawal liability stems from a Congressional concern that ERISA did not adequately protect pension plans from the adverse consequences that resulted when employers terminated their participation in pension plans, which threatened the solvency and stability of both the multiemployer plans and the newly formed Pension Benefit Guaranty Corporation ("PBGC"). *R.A. Gray & Co.*, 467 U.S. at 722-23. The policy reason underlying the numerous time constraints built into the statute (requiring Trust Funds to act with dispatch) was to ensure the financial viability of these pension plans. *Id.* Failing to collect

8. The very first statute of limitations was for a six-year period. "To avoid cutting off the rights of those who had relied upon existing law, their remedies were preserved if they took action before the Feast of Ascension in 1546, a period of six years." Ferguson, William D., *The Statutes of Limitations Saving Statutes*, The Michie Company, 1978.

withdrawal liability over long periods of time requires the other contributing employers to make up any shortfall. *Id.* Higher contribution rates engendered by these shortfalls would be required to maintain current levels and therefore discourage employers from participating in these plans. *Id.* A failure to attract new employers to the multiemployer plan further weakens the pension plan. Moreover, delay jeopardizes the collection of withdrawal liability. Employers over time may go out of business, move, sell the business, go bankrupt, reorganize, or relocate out of the geographical area.

Adoption of Petitioner's position would not be in accord with the statutory directive to commence collection efforts as "soon as practicable" following the plan sponsor's determination that a withdrawal has occurred. Trust funds could delay their efforts to collect withdrawal liability with no meaningful sanction. On the other hand, encouraging trust funds to act with dispatch by commencing the running of the statute of limitations at the time of withdrawal would avoid situations, such as the instant case, where the employer has gone out of business or its assets have otherwise dissipated, and would thus enhance the efforts of trust funds to collect all owed withdrawal liability amounts.

D. The Plain Meaning Of 29 U.S.C. § 1451(f) Is That The Statute Of Limitations Generally Runs From The Date The Fund Knows Or Should Have Known Of The Existence Of The Cause Of Action.

In *Robinson v. Shell Oil Company*, the Court held:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *United States v. Ron Pear Enterprises, Inc.*, 489 U.S. 235, 240, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989); *see also Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S. Ct. 1146, 1149-1150, 117 L. Ed. 2d 391 (1992).

> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477, 112 S. Ct. 2589, 2594-2595, 120 L. Ed. 2d 379 (1992); *McCarthy v. Bronson*, 500 U.S. 136, 139, 111 S. Ct. 1737, 1740, 114 L. Ed. 2d 194 (1991).

117 S. Ct. at 846.

The "act or omission" plainly referenced at § 1451(a) is required to arise "under this subtitle with respect to a multiemployer plan. . . ." The statutory provisions pertaining to withdrawal liability are included in the same subtitle (E) in which § 1451 is contained. The statute directs that an action may not be brought after the *later* of "six years after the date on which the cause of action arose" (29 U.S.C. § 1451(f)(1), *or* "three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of the cause of action". § 1451(f)(2)). Reading § 1451(f) as a whole, when a plaintiff acquired or should have acquired knowledge forms the starting point for the running of the three-year statute of limitations period. If a plaintiff has knowledge of the existence of the cause of action at the time the cause of action arises, then the plaintiff has six rather than three years to sue. This is because the statute does not permit the plaintiff to bring an action after the *later* of: (1) six years from the date the claim arose; or (2) three years after the earliest date plaintiff knew or should have known of the existence of the claim. If a plaintiff does not know of the existence of the cause of action until more than three years from the time it arose, then the plaintiff has only three years from the earliest date it knew or should have known to sue.

The facts of this case are illustrative: (1) Ferbar withdrew in March 1985; and (2) in December 1986 the Trust Fund wrote Ferbar and acknowledged that Ferbar completely withdrew from the Trust Fund in March 1985. Under 29 U.S.C. § 1451(f)(2), the "earliest date on which" the Trust Fund knew or should have known of the existence of a withdrawal liability cause of action was March 1985

when Ferbar ceased making contributions. The latest date on which the Trust Fund could sue was six years from the March 1985 date on which the cause of action arose. § 1451(f)(1).[9] The Trust Fund's actual knowledge of the existence of the cause of action in March 1985 means that but for the statute's "later of" modifier (and the six year limitations period found at § 1451(f)(1)), its claim would have expired in March 1988 (pursuant to § 1451(f)(2)). Simply put, the six year limitation period found at § 1451(f)(1) gave the Petitioner a three-year "bonus" timeperiod (beyond the initial three year period provided at 29 U.S.C. § 1451(f)(2)) to bring such a claim.

In fiduciary breach claims arising under 29 U.S.C. § 1113(2) of ERISA, the courts have explained that the statutory period begins to run "not when a violation or breach occurs, but when the person harmed acquires 'actual knowledge' of the occurrence." *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). *Rush v. Martin Petersen Co., Inc.*, 83 F.3d 894, 896 (7th Cir. 1996).

As Judge Posner explained in *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996):

> ERISA's statute of limitations for suits against fiduciaries does not begin to run at the time of injury, but instead (unless the "fraud or concealment" provision is invoked, giving the plaintiff additional time) at the time that the prospective plaintiff acquires actual knowledge of the breach of fiduciary obligation, which may precede any injury. [Citations omitted.]

83 F.3d at 853. This rationale supports Respondents' position that the statute generally begins to run when the Fund knows of the existence of the cause of action.

"[T]he starting point for interpreting a statute is the language of the statute of itself." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). As is explained in Section I, E, *infra*, Petitioner would write § 1451(f)(2) out of the

9. In the instant case, the Trust Fund knew at the same time when the cause of action arose and of the existence of the cause of action. The statute of limitations began to run at the same time under both (f)(1) and (f)(2).

statute for withdrawal liability collection cases. "Absent a clearly expressed legislative intention to the contrary [a statute's] language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission*, 447 U.S. at 108. "The 'strong presumption' that the plain language of the statute expresses Congressional intent is rebutted only in 'rare and exceptional circumstances'." *Ardestani v. INS*, 502 U.S. 129 (1991) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). Where the statutory text is clear, the burden on a party proposing a statutory interpretation at odds with the text is "exceptionally heavy." *Union Bank v. Wolas*, 502 U.S. 151 (1991).

E. Adoption Of Petitioner's Theory Would Render § 1451(f)(2) Meaningless For Withdrawal Liability Purposes.

ERISA is a "comprehensive and reticulated statute," the product of a decade of Congressional study of the Nation's private employee benefit system. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993).

Section 1451(f) provides that an action may not be brought under the section after the later of: (1) six years after the date on which the cause of action arose, or (2) three years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action. One of the basic purposes of § 1451(f)(2) is to provide a starting date for the accrual of the statute of limitations. It does this, in the same manner as other ERISA enforcement provisions, by stating that the statute of limitations begins to run when the plaintiff "knew or should have known" of the existence of the cause of action. Petitioner's interpretation that a cause of action arises under § 1451(f) only after the Trust Fund has met the requirements of § 1399(b)(1) would render the "knew or should have known" requirement at § 1451(f)(2) meaningless.

Under Petitioner's version, § 1451(f)(2) could have no operative effect for collection of withdrawal liability purposes. Once a Trust Fund calculated liability and notified the employer, the Fund would have had to know that a cause of action existed. At the time the employer failed to pay (which triggers the running of the statute under Petitioner's theory), the Fund would have already

had knowledge. However, under Petitioner's theory, that knowledge is irrelevant, thereby rendering (f)(2) irrelevant for virtually every withdrawal.

Petitioner's interpretation would also render the second statutory time period found at § 1451(f)(2) inapplicable to employer withdrawals. The second limitation period in § 1451(f)(2) provides: "except that in the case of fraud or concealment, such action may be brought not later than six years after the date of discovery of the existence of such cause of action." If a cause of action only "accrues" (according to Petitioner) when Plaintiff gets around to making a demand for payment and the employer fails to pay, the statutory language dealing with fraud or concealment is unnecessary. Under Petitioner's approach, when a plaintiff discovers a fraud or concealment, a plaintiff would calculate and impose the liability on the employer. It would then have six years to bring suit from the time of the first missed payment. The six year provision in (f)(2) would have no meaning.

Using the date of withdrawal as the starting point for the running of the statute of limitations gives meaning to all three time periods described at § 1451(f). An employer's withdrawal is the central event that drives the statutory framework. In short, the only circumstance under which § 1451(f)(2) could be given effectiveness for purposes of collection of withdrawal liability is if the statute of limitations began at the time the Trust Fund knew or should have known of the withdrawal.[10]

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10. Respondent submits that the court in *Joyce* improperly analyzed the facts before it. That case involved a construction industry employer which ceased doing business under the name "Sandoz" and stopped making contributions to the fund in 1981. Unbeknownst to the Fund, Sandoz continued in business under a different name. (*See* Amicus Brief of John T. Joyce, *et al.*, p. 10.) The fund did not discover these facts until 1987, and then assessed liability. The court in *Joyce* solely considered whether the date of withdrawal (1981) or the date of the first missed payment should control for the purposes of the running of the statute. In fact, the court should have applied § 1451(f)(2) and found that the trust fund had six years from the 1987 date when it acquired knowledge of the existence of the cause of the "fraud and concealment" to file its suit. That was when it first knew with certainty that there had been a withdrawal under § 1383(b)(2)(B)(i), *i.e.* that the employer ceased to have an obligation to contribute but continued to

(Cont'd)

Although Petitioner and the Solicitor General maintain that § 1451(f)(2) would have meaning for certain narrow purposes other than collection of withdrawal liability[11], it is uncontroverted that it would not have meaning for withdrawal liability collection purposes should Petitioner's position be adopted. Section 1451(f) is the governing statute of limitations for withdrawal liability. Certainly Congress could not have carved out one of the two prongs of the governing limitations statute for most withdrawal liability situations. This Court has said: "Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463 (1975).

Petitioner's interpretation also violates the well-settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect. *United States v. Nordic Village.*, 503 U.S. 30, 36 (1992); *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 103 (1989). Congress did not say that (f)(2) applies for every other possible action under Subtitle E except for the collection of withdrawal liability, nor did it say that only (f)(1) applied to withdrawal liability collection actions. This Congressional silence in the statute can only mean that Congress intended § 1451(f)(2) to apply to all actions that might be brought under Subtitle E, including collection of withdrawal liability.

(Cont'd)

perform work in the jurisdiction. Such an interpretation would breathe life into § 1451(f)(2) for withdrawal liability collection purposes as Congress must have intended. The court's discussion of § 1383(b)(2)(b)(ii), where an employer resumes covered work within 5 years, is dicta as it did not apply to the facts in *Joyce*. However, even under that scenario, the governing provision would be § 1451(f)(2) for a fund that was not aware of the employer's resumption of work.

11. Section 1451(f)(2) clearly encompasses the "more complicated" withdrawal liability questions such as sale of assets, change of corporate structure, suspension of contributions during a labor dispute as it provides for the commencement of a three year limitation period after the trust fund knows or should have known of the existence of the cause of action.

F. Respondents' Interpretation Is Most In Accord With The Surrounding Body Of Law.

The Trust Fund was injured when Ferbar stopped making contributions to the Plan. The fact that this economic injury continued for almost two years before the Trust Fund got around to calculating the amount of Ferbar's withdrawal liability and demanding payment does not change this fundamental fact. Indeed, most economic injuries are inchoate when they occur. For example, when compensation is sought for personal injury such as pain and suffering, lost earning capacity, or medical expenses, the limitations statute begins to run from the date of the accident. *Eisenberg v. Insurance Company of North America*, 815 F.2d 1285, 1292 (9th Cir. 1987); *Sharpe v. Seaboard Coastline Railroad Company*, 528 F.2d 546, 547 (5th Cir. 1976); Corman, "Limitation of Actions," § 7.4.a, pp. 571-72 (1991).

Similarly, claims for benefits brought pursuant to 29 U.S.C. § 1132(a)(1)(B) "accrue" at the time the claim is denied. A participant whose claim for benefits has been denied is required under ERISA to exhaust the plan's internal administrative remedies before suing to protect his or her rights. *Amato v. Bernard*, 618 F.2d 559, 566-68 (9th Cir. 1980); *Diaz v. United Agricultural Employee Welfare Benefit Plan*, 50 F.3d 1478, 1483 (9th Cir. 1995). The fact that the plan's internal review mechanism may take six months or more does not toll the statute of limitations. *Chilcote v. Blue Cross & Blue Shield*, 841 F. Supp. 877, 881 (E.D. Wis. 1993). The plan participant's "harm" occurs or accrues when the claim for benefits is denied, not when the administrative review process has been completed. *Hogan v. Kraft Foods*, 969 F.2d 142, 145 (5th Cir. 1992); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d at 1501.

Moreover, the concept of knew or should have known has been used to determine the time at which other causes of action arise under ERISA. For example, in *Northern California Retail Clerks Unions v. Jumbo Markets*, 906 F.2d 1371 (9th Cir. 1990), a suit for underpayment of pension contributions, the Ninth Circuit explained that the accrual of the cause of action occurs when the plaintiff, "knows or has reason to know of the injury that is the basis of the

action." *Id.* at 1372. Claims arising under 29 U.S.C. § 1140 for interference with protected rights also accrue on the date the plaintiff knew or should have known that the adverse employment decision was communicated and not on the date on which the adverse employment action was taken. *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1140 (7th Cir. 1992).[12] 29 U.S.C. § 1303 gives the PBGC authority to sue to enforce the provisions of Title IV of ERISA and provides that same type of limitations period as is found at § 1451(f). The "knew or should have known" methodology is employed therein. 29 U.S.C. § 1303(e)(6)(b)(i).

29 U.S.C. § 1113 describes the limitation period for breach of fiduciary duty claims. Like 29 U.S.C. § 1451(f), it contains a three-part limitations period. Unlike § 1451, however, the § 1113 three-part limitation period ends after the *earlier* of:

> (1) Six years after (A) the date of the last action which constituted part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> (2) Three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

Thus, even if the Court were to consider § 1451(f) ambiguous, it is rendered clear based on the fact that its meaning as asserted by Ferbar would be consistent with the other parts of ERISA.

> [T]he meaning of terms on the statute-books ought to be determined, not on the basis of which meaning can

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12. ERISA does not provide a specific statute of limitation for actions alleging violations of § 1140. The applicable enforcement provision for § 1140 actions, ERISA § 1132, does not contain a specific statute of limitation. Accordingly, the appropriate period is determined by reference to the state statute of limitations covering cases most analogous to the cause of action asserted by Plaintiffs. *See, e.g., Hinton v. Pacific Enterprises*, 5 F.3d 391 (9th Cir. 1993), *cert. denied*, 511 U.S. 1083 (1994); *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1267 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991).

> be shown to have been understood by a large handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated — a compatibility which by a benign fiction, we assume Congress always has in mind.

Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Justice Scalia, concurring in part).

G. Petitioner's Approach Would Leave Participants Or Beneficiaries Unable To Sue Under § 1451, Although Congress Expressly Allowed Them To Do So.

29 U.S.C. § 1451(a)(1) provides:

> A plan fiduciary, employer, plan participant or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan, or an employee organization which represents such a plan participant or beneficiary for purposes of collective bargaining, may bring an action for appropriate legal or equitable relief or both.

Section 1451(a) expressly authorizes adversely affected participants, beneficiaries or the labor organizations that represent them to bring an action over the omission of a trustee under Subtitle E of the Act, which deals with special provisions for multiemployer plans. The failure of trustees to assess withdrawal liability of a withdrawn employer, or to seek to enforce collection of the assessed liability, would constitute an omission adversely affecting a participant or beneficiary and upon which such participant or beneficiary, or a labor organization that represents them, could maintain an action.

However, a participant, beneficiary, or representative labor organization would not be able to maintain an action against plan trustees for such a failure under Petitioner's theory of the

commencement of the running of the statute. The cause of action would never accrue for such individuals or entities because, according to Petitioner, there would have been no assessment of liability or demand for payment. As no cause of action had accrued for them, they would have no right to sue. Although Petitioner will argue that the individuals could sue for breach of fiduciary duty under § 1113, Congress also expressly allows them to maintain action under § 1451 which they would be precluded from doing should Petitioner's theory prevail.

H. Petitioner's Contention That Installments Unpaid After Six Years From Withdrawal Would Be Uncollectible Is In Error.

Both Petitioner and the Solicitor General in its amicus brief maintain that the rule stating that the statute of limitations begins at the time of withdrawal would prevent a plan sponsor from collecting withdrawal liability after six years, and that a plan that received timely payments for six years would be time-barred from maintaining a collections action after that.

Respondents submit that such a contention is in error. Both the Petitioner and the Solicitor General have failed to take into account § 1451(b) which provides:

> In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

The aim of this statutory provision is to require withdrawing employers who are making regular withdrawal liability payments to continue paying. 29 U.S.C. § 1145, which is incorporated by reference in this section, governs "Delinquent Contributions." Thus, according to this statutory scheme, if an employer has commenced making individual withdrawal liability payments but then stops doing so (even after six years from withdrawal have passed), the trust fund would then be able to institute an action for missed payments under § 1145. Once an employer began making payments,

and then missed a payment, that would be treated as a missed contribution within the meaning of § 1145 and the applicable statute of limitations for delinquent pension contributions would apply.[13] Hence, a trust fund cannot be said to be remediless if an employer stops making withdrawal liability payments after six years from the time it withdrew.

A trust fund would be precluded from bringing a collection action more than six years after withdrawal only if an employer never, as here, made any withdrawal liability payments. In that case, where the employer totally rejected the demand for payment, it would be incumbent on a fund to initiate a collection action within six years from the date of withdrawal. That is an entirely different situation from that where an employer has made at least one or more payments. In the former case, a nonpaying employer has not agreed to participate in the process of liability imposition and payment schedule instituted by the trust fund, while in the latter, an employer, by paying, has agreed to the imposition and scheduling process[14] instituted by the fund. In the situation where no payment is made, the employer would be subject to a suit for collection of the entire amount within six years from withdrawal. An employer who agreed to the process by commencing payment, on the other hand, would find itself subject to court action for missed payments under § 1145.[15]

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13. The applicable statute of limitation in those instances would be the applicable state statute of limitations for breach of written contract. *Jumbo Markets*, 906 F.2d at 1372.

14. A paying employer would not necessarily be agreeing that the amount and payment schedule were correct, and could still challenge any determination of the fund in arbitration. It would, however, be agreeing to the collection process, creating a new, contractual obligation to pay off the liability. A fund would have a separate claim on this obligation with a separate statute of limitations.

15. Respondents' interpretation of § 1451(b) as applying to situations where an employer starts making payments, but then ceases, is consistent with the statutory scheme. If it applies to all missed withdrawal payments, including the first one, there would be no purpose in having a separate statute of limitations provision — § 1451(f).

I. Petitioner's Assertion That The Date Of Withdrawal May, In Some Instances, Be Retroactively Determined Is Not Controlling.

Both Petitioner and the Solicitor General contend that the date of withdrawal is an improper starting time, as that date can only be determined retroactively in certain instances.[16] It pointed out that there are special rules for the construction, entertainment, and trucking industries, that the issue of a controlled group poses uncertainty of withdrawal, and that it may not be determined until a subsequent date that the cessation of contributions during a labor dispute was, in fact, permanent.

Petitioner and the Solicitor General do not depict the construction and entertainment industry situations accurately. If an employer therein ceases making contributions and continues performing work in the jurisdiction, it has withdrawn at that point and no retroactive determination of withdrawal is necessary. If it resumes the performance of work in the jurisdiction within five years without restarting contributions, the conditions for complete withdrawal (and hence the accrual of the cause of action) are met at that time. The three-year statute of limitations under (f)(2) will, in the latter instance, not begin to run until the trust fund knows of the resumption of covered work; and, hence, the issue of retroactive determination of withdrawal becomes irrelevant.

In the trucking industry, although under § 1383(d)(4) the PBGC may not determine for five years after contributions or operations cease that a bonded trucking industry employer has withdrawn (with resulting substantial damage to the contribution base of the plan), the complete conditions for withdrawal are then met when the PBGC makes its determination. The statute of limitations begins to run from the time that the trust fund becomes aware of the PBGC's determination.

With regard to controlled groups, the statute begins to run at the time the plan is adversely affected, not when it ascertains whom

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16. Conspicuously absent from their briefs is any discussion of the facts in this case. In this case, the Trust Fund has admitted it knew Respondent withdrew in March 1985. J.A. 8, 23, 27, 46.

the proper defendant might be. Six years should be ample time for a trust fund to ascertain whether an employer is a member of a controlled group that has withdrawn. *Navco*, 3 F.3d at 171-2.

Finally, in collective bargaining situations, a fund would know within six years whether a cessation of contributions at impasse was permanent. If the bona fides of an impasse is questioned, a union has 180 days to file an unfair labor charge with the NLRB, and a decision on that charge would be decided well within the six-year period.

II. 29 U.S.C. § 1451(f) DOES NOT PROVIDE FOR A 26-YEAR STATUTE OF LIMITATIONS.

Petitioner and the Solicitor General argue that each of the payments found in the Plan sponsor's 20-year withdrawal liability schedule itself contains its own six-year statute of limitations. There is, of course, nothing in 29 U.S.C. § 1451(f) nor in MPPAA's legislative history that hints at this interpretation. More importantly, according to the Trust Fund's theory, the 20-year statutory payment schedule would give the Trust Fund 26 years from the date of the first missed payment before it had to sue on the last missed payment. In *Navco*, the District Court observed: "Fashioning a rule that would lead to such an absurd result is entirely at odds with the purpose of a six-year statute of limitations, and we decline to do so." *Chicago Truck Drivers Pension Fund v. Van Vorst Ind.*, 800 F. Supp. 587, 592 (N.D. Ill. 1992).

In *Navco*, Judge Easterbrook, writing for the Seventh Circuit, specifically rejected Petitioner's contention that the § 1451 contemplated a 26-year time period:

> Judge Plunkett concluded that a pension fund's power to accelerate future installments once the employer misses a payment, 29 U.S.C. § 1399(c)(5); 29 C.F.R. § 2644.4, means that the whole sum becomes due, and the whole claim accrues, when the first payment is missed. This is the right conclusion, but we put it somewhat differently. [T]he pension fund had only one claim against the employer (and, derivatively, against the controlling persons): the amount of

> withdrawal liability. Although a fund may permit an employer to amortize the sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset. Section 1391 calls on the pension plan to determine an amount that is owed; the financing options under section 1399(c) do not break the single debt into little pieces with their own statutes of limitations. . . . Turning six years into twenty-six is a job best left to magicians. . . .
>
> The trustee's obligation to act with dispatch distinguishes debts under ERISA from ordinary contractual debts, in which the debtor and creditor may agree on their own schedule — and in which, therefore, courts often say that there is no duty to accelerate and that each unpaid installment is a new claim. [Citations omitted.] The schedule under section 1399(c), by contrast, is not contractual; the employer did not assent to a longer period for payment and suit. We have not seen any case extending the contractual approach to the MPPAA, and like the district court we believe that it would be imprudent to adopt a rule that relieves the pressure on trustees of pension funds to act with dispatch. Six years is quite sufficient; the trustees may not award themselves more.

3 F.3d at 172-173.

The *Navco* court held that when a fund and an employer cannot even agree on the existence of a contract, a fund has six years during which it can act in whatever manner it wishes — to sue on payments due, to accelerate, or, as in this case, do nothing — but it only has six years. After that date, the fund has lost its right to recover any withdrawal liability. This view has support even among amici that endorse Petitioner. Midwest Motor Freight, Inc., arguing against the Ninth Circuit's holding below, but in favor of adoption of the *Navco* decision that the statute begins to run from the time the trust missed payment for the entire amount of withdrawal liability, contends that the approach of *Navco* "hardly makes mandatory what is optional under the statute. If a pension plan wishes to

rehabilitate the delinquent employer it may do so, but it must sue for the entire amount of withdrawal liability within six years. This is hardly draconian; . . . " (Brief for Midwest Motor Freight as amicus curiae at 12).

The argument presented by the Petitioner and adopted by the Third Circuit in *Kahle*, that a decision supporting *Navco* would deprive the fund of flexibility it needs to recover debts, rings hollow in this context. In its brief, the Petitioner essentially argues that the Congressional intent and the law of contracts grant the fund the "flexibility" to sue this employer more than one time in an effort to recover liability. This Court has frequently expressed dissatisfaction with rules that would encourage an unnecessary multiplicity of actions, especially in cases when Congressional intent to allow such suits is lacking. *See, e.g. Crown Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 351-52 (1983) (also noting that the purpose of statutes of limitations is to put defendants on notice of claims and "to prevent plaintiffs from sleeping on their rights"); *Southern Construction Co., Inc. v. Pickard*, 371 U.S. 57, 60 (1962); *Klehr v. A.O. Smith Corp.*, __ U.S. __, 117 S. Ct. 1984, 1989 (1997) (wherein the court refused to adopt the "last predicate act" rule for the RICO statute of limitations. The Court held that such an interpretation lengthens the limitations period dramatically and thus conflicts with a basic objective underlying a limitations period — repose.)

Judge Alarcon also answers this argument in *Kahle*, arguing in dissent:

> I would not borrow from the law of contracts to negate the intent of Congress that pension funds must act promptly to avoid the compromising the financial integrity of the pension fund and requiring other participants to shoulder the responsibility of employers who withdraw.

Kahle, 43 F.3d at 869. Clearly, assuming a twenty year payment plan, adopting the majority view in *Kahle* would allow a fund to dawdle as occurred here, with the possibility that the fund could wait twenty years, yet recover almost a third of the withdrawal liability presumably owed it. Other employer-

members of the fund would likely be eventually forced to share the burden created due to the fund's lack of diligence. The answer offered by the majority in the *Kahle* decision itself — that the risk of forfeited payments is enough of a disincentive — clearly was not true in either that decision or the instant case, and, again, lost funds are not a consolation to the plan's participants or to the other employer-members of the fund.

One of Petitioner's and the Solicitor General's central arguments in support of their proposition that there is a separate statute of limitations for each payment is that there is a specific default and acceleration mechanism in the statute. However, their argument is based on the faulty assumption that the Fund did not accelerate in this case when in fact it clearly did so.[17] (*See* First, Second, and Third Claims of Complaint.) Hence, under the governing facts of this case, Petitioner may not rely on the argument that the potential for acceleration implies that separate monthly payments bring separate statutes of limitations.

In any event, this is a false argument as it is based on Petitioner's premise that the cause of action does not arise at the time of withdrawal. Now it is claiming that the running of the statute is put off even further than the time of the first missed payment — until after it decides to accelerate. This is just a further example of a plaintiff's effort to unilaterally control the running of the statute.

Finally, the Solicitor General argues that even if the Fund had accelerated, the suit would have been timely as it was filed within 6 years from 60 days after Respondent received Petitioner's April 14, 1997 notice. (Brief of Solicitor General, p. 25, n. 20.) However, the statute which describes acceleration as the means for

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17. Petitioner's argument as to when a cause of action would accrue with regard to the accelerated balance of payments is particularly confusing. Petitioner's Complaint alleges, citing 29 U.S.C. § 1399(c)(5), that the Respondent has defaulted and that the entire sum for withdrawal liability is due. J.A. 9, ¶ 17. This allegation is incorporated within every claim of Petitioner's Complaint. Therefore, the contention of Petitioner and amici that acceleration has not occurred is not consistent with the Complaint. What this also means is that the Fund, in this case, cannot claim that it has never been effectively forced into seeking the entire amount of withdrawal liability, since it obviously did so.

curing default, § 1399(c)(5), clearly implies that the claim for accelerated payment of the entire amount would run from the date of the first missed payment:

> In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability *from the due date of the first payment which was not timely made.* (Emphasis supplied.)

Since the statute requires that interest run from the date of the first missed payment where the debt has been accelerated, so should the limitations period for an action on the accelerated amount.[18]

Petitioner's interpretation would require a wholesale reconfiguration of the statute of limitations. There is no mention of this 20-year recovery period in 29 U.S.C. § 1451(f). To insert this requirement in § 1451 would work a kind of linguistic havoc. Section 1451's detail, its description of both procedural and substantive forms, and its explicit listing of exceptions, taken together, clearly indicate that Congress did not intend for the courts to read an unmentioned, open-ended 20-year exception into a statute that is so carefully drafted.

The absurdity of Petitioner's interpretation is best shown through the facts of this case. According to Petitioner, although it sat on its rights to collect withdrawal liability for almost eight years, it claims to have been out of pocket only one monthly payment of $345.50 at the time it filed suit. It seems incredibly strange that Congress could have intended this result when it drafted 29 U.S.C. § 1451(f)(1) which simply calls for a six-year limitation period.

18. *Cf.* Internal Revenue Code § 6601(e) which provides that interest on an underpayment of any tax is treated in the same manner as the tax. Moreover, the limitation on the assessment and collection of interest is for the same time period under which the tax may be assessed and collected. § 6601(g).

A. The Application Of Petitioner's "Continuing Violation" Theory Founders On The Plain Language Of 29 U.S.C. § 1451(f)(2).

Section 1451(f) provides that a plaintiff must bring a claim after the later of 6 years after the date on which the claim arose, or three years after the "earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." In *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), *cert. denied*, 504 U.S. 911 (1992), a large number of Trans-Alaska pipeline workers sued for pension benefits. In rejecting the plaintiff's "continuing violation" theory, the Ninth Circuit explained:

> [T]his section [§ 1113(a)(2)] requires the plaintiffs' knowledge to be measured from the "earliest date" on which he or she knew of the breach. While the trustee's conduct may be viewed as a series of breaches, all were of the same character: a failure to amend vesting rules. Once a plaintiff knew of one breach, an awareness of later breaches would impart nothing materially new. . . . The earliest date on which a plaintiff became aware of any breach would thus start the limitation period of section 1113(a)(2) running. The district court's application of the continuing violation theory essentially reads the "actual knowledge" standard out of the statute.

944 F.2d at 520.[19] *Accord, Pisciotta v. Teledyne Industries, Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996) (applied to an ERISA claim

19. Judge O'Scannlain explained in concurring:

> If the "continuing violation" rationale that we have applied in other contexts were as broad as the plaintiffs in the district court suggest, the "actual knowledge" provision in the statute would be superfluous and virtually no breach would ever grow stale so long as it remained unremedied. The plaintiffs in the district court have confused the failure to remedy the alleged breach of an obligation with a commission of an alleged second breach, which, as an overt act of its own, recommences the limitations period.

944 F.2d at 522-523.

for benefits). Here, the "earliest date on which the plaintiff acquired or should have acquired knowledge of the existence" of the withdrawal (March 1985) would start the limitation period of § 1451(f) running.

B. The Solicitor General's Analogy To § 1451(b) Is Misplaced.

In support of its position, the Solicitor General cites *Trustees for Alaska Laborers v. Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987), for the proposition that, if an employer fails to make monthly contributions to a multiemployer plan under 29 U.S.C. § 1145, the limitations period runs against each monthly right of action separately. Based on this he argues that any missed installment payment constitutes a separate violation of the Act. (Brief for Solicitor General at 23-24).

According to the Solicitor General, "the same [six year] limitations rule should apply to delinquent contributions and delinquent payment of scheduled withdrawal liability installments." (Brief for Solicitor General at 24, n. 17.) Section 1451(b) of the MPPAA, however, provides that in any action "to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title)." 29 U.S.C. § 1451(b).

There are several difficulties within the Solicitor General's analysis. First of all, the Solicitor General's reliance on *Ferrell* is misplaced. *Ferrell*, like *Jumbo Markets*, simply holds that delinquent contribution cases are contractual in nature, and, because § 1145 does not contain its own statute of limitations, the most analogous state statute of limitations is to be borrowed. *Ferrell*, 812 F.2d at 517. In the instant case, Respondent never agreed to the schedule of payments so the contractual analogy as expressed in *Ferrell* is inapplicable. Secondly, as explained *supra*, actions for delinquent contributions are subject to the applicable state statute of limitations for written contracts, so the "limitations rules" as described by the Solicitor General in its brief are not identical.

Third, the Solicitor General ignores the statutory context. Section 1451(a) describes who can bring claims under subtitle E. Section 1451(b) then describes what happens when things go wrong under normal circumstances — that is, where an employer begins to make withdrawal liability payments and then stops, it shall be treated as a delinquent contribution under § 1145.

C. Withdrawal Liability Is Not An Installment Obligation As Petitioner And The Solicitor General Suggest.

Petitioner and the Solicitor General refers to installment obligations in arguing that a separate cause of action exists for each payment of an obligation which has not been accelerated. However, Respondent cannot be said to have given its assent to the schedule of payments or entered into any sort of contractual arrangement. Petitioner presented the Respondent with a bill for the full amount of withdrawal liability, and stated that the employer could either pay the full amount or amortize payments across a 20 year schedule. J.A. 23-24. The employer did not pay the full amount, nor did it make its first monthly payment, nor has it made any monthly payment to date. J.A. 46, ¶¶ 7, 9. In fact, it twice challenged the very existence of any liability at all to the fund by requesting review and initiating arbitration. J.A. 31-34, 37.

As the Ninth Circuit pointed out below, "Ferbar never agreed to the installment plan proposed by the fund and made no installment payments. As a result, it appears that no new contract to pay off the withdrawal liability could have been formed. *See* 1A Arthur L. Corbin, Corbin on Contracts § 211 (1963). Had such a contract been formed, the Fund might have a separate claim, with its own statute of limitations, for breach of that contract." (emphasis supplied). Pet. App. 5a, n.4. This rationale is the thrust of Judge Easterbrook's opinion in Navco as well: "The [payment] schedule under § 1399(c), by contrast, is *not* contractual; the employer did *not* assent to a longer period for payment and suit." *Navco*, 3 F.3d at 172. The facts of the instant case support the Navco and Ninth Circuit theories.

Petitioner and the Solicitor General also argue that even though Ferbar never made any payments of any kind and even though the

trust fund sued to accelerate the total amount of the debt, the underlying "command" of the statute is to pay withdrawal liability debt in equal installments. According to Petitioner (and the Solicitor General), this purported underlying statutory command to make installment payments is the deus ex machina that saves its own time-barred claim.[20] However, as noted *supra*, an employer is given the option to pay in installments or a lump sum. 29 U.S.C. §§ 1399(c)(2) and 1399(c)(4). Thus installment payments are not "commanded" by the statute. In fact, Petitioner repeatedly advised Respondents that they had this option. This is a false argument, in any event, under the circumstances of this case when the employer has not made any payments and the Petitioner has sued for the entire amount.

Justice Breyer, writing for a unanimous Supreme Court, in *Jos. Schlitz*, observed that a withdrawal liability payment:

> looks more like a tax or purchase-money installment than a loan installment. . . . In fact, the withdrawing employer cannot determine, or pay, the amount of its debt until the plan has calculated that amount — which must take place sometime after the beginning of the withdrawal year. All these features make it difficult to find any analogy in withdrawal liability to a loan.

115 S. Ct. at 988.

A "tax" is defined by Black's Law Dictionary as:

> [A] pecuniary burden laid upon individuals or property to support the government, and is payment exacted by legislative authority. [citation omitted]. Essential characteristics of a tax are that it is not a voluntary payment or donation, but an enforced contribution, exacted pursuant to legislative authority. *In re Mytinger*, 31 F. Supp. 977, 978 (D.C. Tex. 1940).

Black's Law Dictionary, 6th ed. (1990), p. 1457. Even should monthly payments of withdrawal liability be deemed commanded by statute, that would not cause them to be divested of their characteristic of a tax and rendered akin to an installment obligation.

D. Petitioner's Interpretation Of 29 U.S.C. § 1451 Would Upset The Balance Between The Regulation Of Employee Benefit Plans And The Costs Of Compliance.

"There is a 'tension between the primary [ERISA] goal of benefiting employees and the subsidiary goal of containing pension costs.' " *Mertens v. Hewitt Associates*, 508 U.S. at 262 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)); [bracketed material added by the Court]. Congress was concerned lest excessive costs discourage employers from offering and maintaining benefit plans at all. *Alessi, supra*, 451 U.S. at 515. This balance is fundamental to ERISA's remedial scheme. This Court has refused to rewrite ERISA by inferring obligations and remedies Congress did not expressly provide. *See Mertens*, 508 U.S. 248 (1993) (holding that ERISA § 502(a)(3) does not authorize an action for money damages against a nonfiduciary who allegedly participated in the plan fiduciary's wrongdoing); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 147-48 (1985) (holding that ERISA § 409(a) does not authorize an action by a plan participant for extra-contractual damages).

20. The authority cited by the Solicitor General for the proposition that this lack of assent to a contract on the part of Respondent is not controlling proves quite the opposite. The Solicitor General cites *Waggoner v. Dallaire*, 649 F.2d 1362 (9th Cir. 1981) for the proposition that the imposition of a statutory scheme creating the option of paying off a debt in installment payments creates a statute of limitations for each installment. (Brief for Solicitor General at 24 n.18.) The court in *Waggoner* went to great lengths to emphasize how the employer's obligation to make installment payments arose out of a contractual obligation because the Labor Management Relations Act required the same (and required the agreement to make installment payments to be in writing). Section 302(c)(5) of the LMRA, permits employer contributions to employee welfare trust funds, but requires that "the detailed policy on which such payments are to be made" be "specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5). Similarly, the District Court in *Davis v. Alabama Power Co.*, 383 F. Supp. 880 (N.D. Ala. 1974), *aff'd*, 542 F.2d 650 (5th Cir. 1976), *aff'd*, 431 U.S. 581 (1977), also cited by the Solicitor General for this same proposition, when examining how the statute of limitations should apply to a plaintiff who was attempting to recover pension payments allegedly due him, held that "the collective bargaining agreement covering the plaintiff at the time of his retirement included the pension plan *as a matter of contract and hence the pension plan was part of his contract of employment.*" (emphasis supplied) *Davis*, 383 F. Supp. at 893. The District Court then applied Alabama's statute of limitations for written contracts to the incomplete argument plaintiff's claim. *Id.*

Petitioner attempts to bolster its assertion that the statute of limitations of MPPAA runs for up to twenty-six years by alluding to MPPAA's purposes as being "to provide a mechanism for preserving the long-term financial integrity of multiemployer plans in the face of such employer turnover." *Petitioner's Brief* at p. 16. In *Mertens*, the Supreme Court concluded:

> [V]ague notions of a statutes "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. *See PBGC v. LTV Corp.*, 496 U.S. 633, 646-647 (1990). This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs. *See, e.g., Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54-56 (1987).

508 U.S. at 261-262.

Petitioner's "borrowing" of selected parts of § 1399 to extend the limitations period for up to 26 years would establish a new remedy that Congress did not expressly provide. The almost never-ending liability for withdrawing from a multiemployer plan would be viewed by employers as an additional liability. Although Petitioner's theory would appear to financially benefit dilatory trust funds, the further relaxation of collection efforts would have quite the opposite effect. The trust fund's financial health would be further undermined because this new and costly remedy would also serve to discourage new employers from participating in multiemployer pension plans. As this Court ruled in *Massachusetts Mutual Life Insurance Company v. Russell*:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. As we stated in *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 1119 (1979): "[w]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it". *See also, Touche Ross & Company v. Redington*, 442 U.S. 560, 571-574 (1979). "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 97. [footnote omitted]

473 U.S. at 148.

E. Petitioner's Proposed Enforcement Mechanism Does Not Work.

Petitioner's Brief concludes with a description of its own enforcement mechanism (in the absence of a beginning date for the statute of limitations). Petitioner's enforcement mechanism consists of: (1) a self-inflicted wound; (2) an open invitation to litigation; and (3) a betrayal without remedy. The purported enforcement by the "self-inflicted wound" consists of the fact that the Trust Fund asserts it will be spurred into action because it will lose interest by failing to make a timely assessment. Petitioner's Brief at 39. Petitioner, of course, ignores the fact that in this case it waited almost two years to assess the Respondents. However, the real economic injury is the potential loss of the entire withdrawal liability assessment which may be lost if the Trust Fund fails to timely protect its rights.

The "invitation to additional litigation" derives from Petitioner's suggestion that an employer, "prejudiced" by the plan sponsor's failure to demand payment of withdrawal liability "as soon as practicable (§ 1391(b)(1)) can raise that failure as a defense in arbitration to the assessment of withdrawal liability." Petitioner's Brief at p. 40. The term "practicable", according to Petitioner, will have to be defined through litigation.

Finally, Petitioner suggests that dilatory trustees "who failed to perform their statutory duty may invite claims for breach of fiduciary duty" from unhappy participants. Petitioner's Brief at p. 40. This is a "betrayal without remedy" because, if Petitioner's position is sustained, the Plan's participants will have no claim against the Plan's trustees until the trustees get around to making a withdrawal liability demand. In addition, the dilatory trustees would undoubtedly raise the statute of limitations under 29 U.S.C. § 1113

(the earlier of three years from actual knowledge or six years from the date the claim arose) to bar the participants claim.

In short, because Petitioner's enforcement mechanism is impractical, would invite additional litigation and would provide no meaningful remedy for harmed participants, it must be rejected.

CONCLUSION

For the foregoing reasons, the judgment below should be sustained.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

I. A CAUSE OF ACTION TO COLLECT A WITHDRAWAL LIABILITY PAYMENT ARISES WHEN A SCHEDULED PAYMENT IS MISSED.

(a) Respondent Ferbar Corporation's primary submission is that under the Multiemployer Pension Plan Amendments Act ("MPPAA"), 29 U.S.C. §§ 1381-1461, the cause of action to collect unpaid withdrawal liability arises on the date of withdrawal. Brief for Respondent ("Resp. Br.") at 15. At the same time, Ferbar acknowledges that the well-established "proposition that the statute of limitations begins to run from the time the action first could have been instituted" is "correct." Resp. Br. at 18; *see* Brief for the Petitioner ("Pet. Br.") at 14-15. Thus, of necessity respondent must—and does—maintain that fund trustees can maintain a suit to collect withdrawal liability from an employer on the date on which the employer ceases making contributions to a multiemployer pension fund. Resp. Br. at 17.

This proposition, critical to Ferbar's entire argument, could not be more wrong. Any MPPAA withdrawal liability collection lawsuit filed *before* the fund makes an assessment and demand and the employer fails to make one or more timely payments would necessarily be summarily dismissed, because, until that point, the employer has not violated any obligation under the statute. Pet. Br. at 16-21.

Ferbar fervently maintains otherwise, relying on § 1451(a). Resp. Br. at 16-17. That section provides that "[a] plan fiduciary, employer, plan participant, or beneficiary, who is adversely affected by the act or omission of any party under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief." Ferbar's argument is that this section permits fund trustees to file suit whenever a plan is "adversely affected," and that a plan is necessarily so affected by an employer's withdrawal from the plan. Resp. Br. at 16-20.

But § 1451(a) does not provide a cause of action in the air for *any* adverse effect on multiemployer pension funds. That section establishes a cause of action only where the adverse effect is caused "by the act or omission of any party *under this subtitle*" (emphasis added), confirming that Congress intended to permit suit at the point that a breach of a *statutory* obligation occurs.

Thus, the essential point here is that an employer commits no violation of MPPAA by withdrawing from a multiemployer pension fund. The statutory scheme, rather, imposes withdrawal liability as an incident of an employer's *lawful* cessation of plan contributions. § 1383(a). Withdrawal itself is perfectly proper under ERISA, and therefore cannot be analogized, as Ferbar would have it, to a tort, breach of contract, statutory violation or other action inconsistent with an obligation imposed by law. Only by failing to pay one or more of the statutorily-mandated withdrawal liability payments *after* the fund makes an assessment and demand upon the withdrawn employer does the employer violate its statutory obligations. Pet. Br. at 16-20.

The theory of the MPPAA withdrawal liability scheme confirms that the statute's purpose is not to prohibit withdrawals, but to provide an approximate, carefully-devised economic replacement for the contributions the withdrawn employers would have made, so that plans may meet their future benefit obligations. As enacted, ERISA had provided that employers withdrawing from multiemployer plans were "subject to a contingent liability that was dependent upon the plan's termination in the next five years. . . ." *Concrete Pipe & Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 608 (1993). MPPAA, enacted to amend ERISA in this respect, created instead "a *prophylactic* extension of the liability initially imposed by ERISA . . . to insure that 'an employer withdrawing from a multiemployer plan w[ill] . . . complete funding its fair share of the plan's unfunded liabilities.' " *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 231

(1986) (O'Connor, J., concurring) (emphasis supplied, citations omitted.) *See also id.* at 217, citation omitted ("withdrawal liability would discourage voluntary withdrawals" and "cushion the financial impact on the plan.")

The MPPAA withdrawal liability scheme, then, is simply a " 'legislative Act[] adjusting the burdens and benefits of economic life' . . ." as between certain employers and their employees, (*Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 728 (1984) *quoting Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)), not a means of redress for a breach of some legal obligation perpetually to contribute to pension funds once the employer begins doing so. That is why the MPPAA does not pretend to "make withdrawing employers pay an actuarially perfect fair share, namely a set of payments in amounts that, when invested, would theoretically produce . . . a sum precisely sufficient to pay (the employer's proportional share of) a plan's estimated future vested benefits." *Milwaukee Brewery Workers Pension Plan v. Jos. Schlitz Brewing Co.*, 115 S. Ct. 981, 990 (1995) ("*Schlitz*"). And, that is why the Act does not provide a cause of action for withdrawal, but a cause of action for failing to meet the obligation to make withdrawal liability payments once that obligation is imposed through a fund trustees' assessment and demand.

(b) A firm confirmation that the MPPAA does not permit fund trustees to sue to collect withdrawal liability on the date of withdrawal is that such a lawsuit would be inconsistent with the plethora of detail in the statute covering collection of that liability.

For example, for the reasons discussed in detail in our opening brief, there are a myriad of circumstances under the statute in which a suit filed on the date of withdrawal could not possibly allege a ripe cause of action because the events necessary to establish whether there had been a withdrawal could not yet have occurred. *See* Pet. Br. at

16-19.[1] Nor could a lawsuit on the withdrawal date, if it were filed, demand cognizable relief in the form of payment of a portion of the withdrawal liability—*viz.* the kind of relief that is the *sine qua non* of collection suits. Before assessment and demand, an employer has no obligation to make any periodic payment. And, the statute does not require an employer to pay the total liability amount as long as the employer is meeting the obligation to make timely payment of the periodic payments calculated under §§ 1399(c)(1)(A), (c)(3), and (c)(1)(C) & (E); *see* Pet. Br. at 24-25, 28-31. The trustees therefore could not sue for the total amount of withdrawal liability either.

Finally, a lawsuit filed on the date of withdrawal could not even adjudicate in the abstract whether some liability will be owed at some time in the future. The statute contemplates that questions concerning the existence and the proper amount of withdrawal liability will be decided by an *arbitrator*, not a court, and establishes with specificity the timing and procedures of the arbitration and ensuing judicial review. § 1401; *see generally Concrete Pipe, supra.* And, the arbitration requirement in the statute, and related internal review provisions, are pegged to the date of assessment and demand, and do not come into play before then. § 1401; *see* also § 1399(b)(2).

Ferbar does suggest that fund trustees could file a lawsuit on the date of withdrawal anyway, even though at that time they "cannot, with honesty, make the necessary allegations to support an action." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 515 (1967). But such a "protective suit would be a sheer formality—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." *Id.* There

[1] These insurmountable timing problems, we stress, are not simply problems of knowledge, accounted for by the § 1451(f)(2) alternative, shorter statute of limitations. Rather, events such as the return of a construction employer (§ 1383(b)), or the PBGC trucking industry determination (§ 1383(d)), *occur* after the date later retroactively determined to be the date of complete withdrawal.

is no indication MPPAA intended to authorize such pointless lawsuits.

(c) A final, compelling indication that the § 1451(a) cause of action for the entire withdrawal liability due does not arise on the date of withdrawal is that if it did, the limitations periods provided in § 1451(f) would prevent trustees from suing on any withdrawal liability payments due more than six years after the withdrawal date. Yet, under the complex statutory scheme for setting the withdrawal liability periodic payment schedule, payments can be due for up to twenty years, as in this case. J.A. 23. The result of Ferbar's statutory construction, then, would be that an employer could with impunity refuse to make the statutorily-required payments due more than six years from the date of withdrawal. Ferbar's attempt to deal with this glaringly absurd consequence of its approach to the statute fails utterly.

Ferbar proposes that § 1451(b) of the statute resolves the uncollectable payments problem, by "requir[ing] employers who are making regular withdrawal liability payments to continue paying." Resp. Br. at 34. Section 1451(b) accomplishes this end, we are told, because, by making one or more payments, an employer "has agreed to the imposition and scheduling process instituted by the fund," and is therefore "subject to court actions for missed payments." Resp. Br. at 33-34. This § 1451(b) interpretation is made of whole cloth.

The provision upon which Ferbar hangs so much of its argument reads in its entirety as follows:

> § 1451(b): In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

Section 1145, in turn, provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the

> plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement.

And, §1132(g) specifies that in a successful suit to collect contributions due under § 1145, the remedies shall include, in addition to the unpaid contributions, interest, attorneys' fees, and statutory liquidated damages.

Nothing in § 1451(b) indicates that § 1451(b), or any other withdrawal liability provision in the MPPAA, applies only to "[a]n employer who agreed to the process by commencing payment." Resp. Br. at 34. Section 1451(b) on its face applies to "*any* failure of the employer to make *any* withdrawal liability payment within the time prescribed." (Emphasis supplied). There is no exception for the first withdrawal liability payment due, nor any indication that an employer can simply opt out of the mandatory *statutory* requirement to make *all* withdrawal liability payments by the time the payment is due by failing to make the first such payment.

Section 1451(b)'s reference to § 1145 and, through § 1145 to § 1132(g), does not provide any support to Ferbar's construction either. Section 1451(b) specifically recognizes that an action to collect overdue withdrawal liability payments may be brought "under this section"—that is, under § 1451 as a whole. *See also* § 1451(c) (special venue provision for withdrawal liability collection suits "under this section."). Thus, the references to § 1145 and, implicitly, to § 1132, do not direct that withdrawal payment collection suits be brought under § 1132.

Nor do those references, as Ferbar at one point suggests (Resp. Br. at 34), substitute, under the borrowing principle used for suits that do arise under § 1132, the limitations periods of the 50 states for the uniform limitations period contained in § 1451(f). Instead, as the legislative history expressly states, the statutory reference in § 1451(b) to § 1145 simply incorporates for § 1451(b) withdrawal liability collection purposes the *remedies* available for a violation of § 1145. 126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson). *See, e.g., Amalgamated Ins. Fund Trustees v. Sheldon Hall Clothing,* 862 F.2d 1020 (3rd Cir. 1988); *Galgay v. Beaverbrook Coal Co.,* 105 F.3d 137 (3rd Cir. 1997).

Finally, it is very much to the point in this regard that nothing in § 1451(b) or the cross-referenced statutes indicates an intention to transform the MPPAA mandatory requirement to make periodic withdrawal liability payments into an obligation that applies only to employers who agree to meet that obligation. To the contrary, the primary purpose of § 1145 is to convert contractual obligations by participating employers to make pension fund contributions *into* statutory ones, so that statutory remedies will be available where the contributions are not made. Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., Report on S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 43-44 (Comm. Print April 1980); 126 Cong. Rec. 23,039 (Aug. 25, 1980) (statement of Rep. Thompson). There is no indication whatever in § 1451(b) that alchemy in the other direction—from statutory requirement to private agreement—was intended.

(d) To justify its invitation to judicial revision of the MPPAA, Ferbar seeks to analogize this withdrawal liability statute of limitations case to cases brought after the defendant has committed a tort or a statutory violation, where the plaintiff has to, or chooses to, resort to an administrative procedure to perfect his or her claim. *Unexcelled Chemical Corp. v. United States,* 345 U.S. 59

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[2] Section 1145 applies directly only to employers "obligated to make contributions . . . under the terms of the plan or under the terms of a collective bargaining agreement"; employers subject to a withdrawal liability obligation by definition are not so obligated. § 1383(a); *see* p. 2, *supra*. And, § 1451(b) states that failures to make withdrawal liability payments are to be treated "in the same manner as" delinquent contributions under § 1145, not that missed withdrawal liability payments are to be treated *as* delinquent contributions under that section.

(1953); *McMahon v. United States*, 342 U.S. 25, 27 (1951). Both *Unexcelled Chemical* and *McMahon*, however, are fully consistent with the usual rule that a cause of action accrues and the statute of limitations begins to run, at the earliest, once the defendant's wrong has occurred. *Unexcelled Chemical*, 345 U.S. at 65 ("A cause of action is created when there is a breach of duty owed the plaintiff"); *McMahon*, 342 U.S. at 26-27 (the "limitation depended upon the event giving rise to the claims," that is, the "actionable wrongs"); *see also Reading Co. v. Koons*, 271 U.S. 58, 64 (1926) (a cause of action for wrongful death accrues "on the happening of the events which fix the defendant's liability".

Unexcelled Chemical and *McMahon* thus establish *not* that suit could be filed *before* the defendant had violated any legal obligation, but only that where such a violation has taken place the statute of limitations can then begin to run despite the filing of administrative proceedings relating to the claim.[3]

[3] Further, in *Unexcelled Chemical*, "the United States, to which damages were payable, could have brought suit without first resorting to administrative remedies." *Crown Coat Front Co. v. United States*, 386 U.S. 503, 518 (1967). *See also Reading Co., supra*, 271 U.S. at 62-63 (decedent's beneficiaries could have filed the lawsuit upon the decedent's death); *Crown Coat Front Co.* at 517 (explaining that in *McMahon*, suit was filed under the Clarification Act, 57 Stat. 45, amendment to the Suits in Admiralty Act, bringing a seaman's action for negligence and seaworthiness within the Suits in Admiralty Act; although the Clarification Act "permits court action only if the claim has been administratively disallowed . . . [t]he Court saw no indications that Congress in passing the Clarification Act intended to postpone the usual time of accrual of the cause of action [under the Suits in Admiralty Act] until the date of disallowance").

It is worth noting that Ferbar's representation to the contrary notwithstanding (Resp. Br. at 30), the benefit denial cause of action in ERISA has been uniformly construed so that the cause of action does not accrue and the limitations period does not begin to run until internal appeals have been exhausted. *Rodriguez v. MEBA Pension Trust*, 872 F.2d 69, 71-72 (4th Cir.), *cert. denied*, 493 U.S. 872 (1989); *Jenkins v. Local 705, International Bhd. of Teamsters Pension Plan*, 713 F.2d 247, 249, 254 (7th Cir. 1983); *Hemphill v. Unisys Corp.*, 855 F. Supp. 1225 (D. Utah 1994); *Kroschinsky v. Trustees of Steamship Trade Assoc.*, 790 F. Supp. 559 (D. Md. 1992).

So here: the limitations period begins to run once the employer fails to make a required periodic payment, and is not affected by the pendency of arbitration proceedings under the statute.

Indeed, the truly analogous statute of limitations cases in this Court—those concerning the payment of monetary debts dependent upon a prior assessment of and demand for the debt—are fully consistent with our position in this case. *See Woods v. Stone*, 333 U.S. 472, 476 (1948) (limitations period runs from refund order, not from date excess rent was collected, because "[t]he duty to refund was created and measured by the refund order, and was not breached until that order was disobeyed"); *Rawlings v. Ray*, 312 U.S. 96 (1941); *Fisher v. Whiten*, 317 U.S. 217, 220-21 (1942); *Cope v. Anderson*, 331 U.S. 461, 464 (1947).

II. THAT CONGRESS DECIDED TO REQUIRE THE INITIAL ASSESSMENT TO BE MADE "AS SOON AS PRACTICABLE," RATHER THAN WITHIN A FIXED TIME PERIOD, PROVIDES NO BASIS FOR REWRITING MPPAA.

Ferbar's remaining arguments reduce to a quarrel with Congress' decision to provide a promptness standard for a fund's assessment of withdrawal liability that is not expressed as a fixed period of time after the statutory withdrawal date. MPPAA directs that the assessment be made "as soon as practicable after an employer's complete or partial withdrawal." § 1399(b)(1). Ferbar characterizes this standard as permitting trustees in their "absolute direction" and "whim" to delay "indefinitely" sending out the initial assessment. Resp. Br. at 20-23. Ferbar's "solution" is to revise MPPAA to start the § 1451(f) fixed-time-period limitations provisions for a collection action on the withdrawal date, so as to encompass the assessment period.

It suffices to point out that statutory revision is a task for Congress not this Court. There is, however, also a great deal to be said on Congress'—and § 1399(b)(1)'s—behalf.

(a) The initial assessment is the fundamental step in MPPAA's scheme of assessing and collecting withdrawal liability. This assessment puts the employer on notice of the fund trustees' claim, starts the time period for requesting review and arbitration, requires the employer to begin making withdrawal liability payments regardless of any request for review, and becomes final if not challenged.

Congress' decision *not* to set a fixed time within which the assessment must be made clearly was a considered choice, as MPPAA contains fixed time periods within which virtually every *other* step connected with the determination or collection of withdrawal liability must be taken, *e.g.*, § 1399(a), (b)(2)(A), (c)(2), § 1401(a)(1). This choice to set a situation-sensitive rather than an inflexible period for judging the promptness of the initial payment demand makes good sense, because, for a number of reasons, the period after withdrawal within which it is in fact practicable to assess withdrawal liability will range widely, from a few weeks to many years.

First, as we explained in our opening brief, under MPPAA there are many situations in which the question whether an employer has withdrawn must be answered retroactiveiy, based on events that occur years after the date that MPPAA deems to have been the withdrawal date. Pet. Br. at 17-19.

Second, in many instances it will not be practicable to calculate withdrawal liability immediately. Calculation of withdrawal liability depends on the plan's unfunded vested liability as of the last day of the plan year preceding the date of withdrawal (*Schlitz*, 115 S. Ct. at 986), and fund trustees determine that unfunded vested liability for the purposes of annual reports that ordinarily are not filed until 7 months after the close of the plan year, and the filing of which may be extended an additional 2½

months. § 1024(a)(1).[4] Thus, for employers (like Ferbar) that effect withdrawals toward the beginning of a plan year, there would be up to a 9½ month delay before the pertinent calculation of unfunded vested liability is available.[5]

These delays are "structural," in that they are built into the manner by which MPPAA fixes the withdrawal date and liability. There also will be other circumstances, such as a mass withdrawal or major labor dispute affecting plan contributors, that will affect the time period within which it is "practicable" for the fund trustees to assess withdrawal liability. Congress can hardly be faulted for recognizing the variability of these circumstances and resisting the siren song of a fixed time period for initial notice to the withdrawn employer.

(b) That Congress did not set a *fixed* time period within the initial assessment must be made does not mean that Congress set *no* time period at all, or left employers indefinitely in limbo, with no way to determine their potential liability. The directive to act "as soon as practicable" *is* a statutory command, and fund trustees must follow it. Ferbar, after so recognizing by describing the directive to make the initial assessment "as soon as prac-

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[4] As the Court recognized in *Schlitz*, Congress intended fund trustees to be able to rely on the annual report in assessing withdrawal liability, which is why MPPAA deems all withdrawals occurring during a plan year to have occurred, for calculation purposes, as of the last day of the preceding plan year. 115 S. Ct. at 986. *See also* 126 Cong. Rec. 23,041 (Aug. 25, 1980) (statement of Rep. Thompson).

[5] Some MPPAA methodologies for calculating withdrawal liability (including the methodology adopted by this plan) also require determination of withdrawing enployers' prior *required* contributions to the plan, rather than their actual contributions. Making this determination generally necessitates a payroll audit of the withdrawn employers. *See* J.A. 40; *see also* § 1391(c)(3) (setting forth calculation method adopted by this plan). And, the calculation of withdrawal liability may require the fund trustees first to obtain records within the possession of the employer, not the plan, a contingency MPPAA recognizes and provides for. § 1399(a).

ticable" as "the fundamental statutory requirement for plan sponsors" (Resp. Br. at 4), nonetheless writes that language out of MPPAA *entirely* by claiming the statutory requiremnt could not be enforced, or would be ineffective if it were (Resp. Br. at 47-48).

But there is a built-in incentive for prompt assessment, as the fund forever will lose interest on withdrawal liability payments not timely demanded. Pet. Br. at 39-40. And, if the trustees violate their § 1399(b)(1) duty to make the initial assessment "as soon as practicable," this failure to comply with the statute can be raised by the employer in arbitration as a defense to liability. Pet. Br. at 40. The "as soon as practicable standard," that is, creates a defense quite similar to laches, requiring the decisionmaker to consider all the relevant circumstances in determining timeliness. And laches, which has a fine historical pedigree (*see Patterson v. Hewitt,* 195 U.S. 309, 317 (1904)), is not an invitation to indefinite delay, but a way of judging timeliness different from the fixed limitations period approach.

Nor is the hypothetical employer concerned about delay in assessing withdrawal liability and not "able to plan [its] business and financial future[] with any degree of certainty" (Resp. Br. at 22) without other recourse under MPPAA. That employer may "request in writing that the plan sponsor make an estimate of such employer's potential withdrawal liability" and "make available general information necessary for the employer to compute its withdrawal liability" and similar information "unique to that employer." § 1401(c). The fund trustees have a duty to comply with such a request.

(c) Throughout its brief, Ferbar suggests that *it* (Ferbar) did not receive a timely initial assessment, and that the statute should be interpreted so as to prevent such delays in the future. In fact, the record is silent on the circumstances surrounding the initial assessment here. And, there is no reason to torture the statute to deal with delay in initial assessments because, as we have

noted, such delay is a defense in arbitration. Ferbar's problem here is that Ferbar waived this issue by not raising the issue in its Notice of Initiation of Arbitration. J.A. 38. Ferbar sought arbitration *only* as to the issues in its letter to the plan requesting review and those issues did *not* include any issue regarding the timing of the initial assessment. J.A. 31-34.

Ferbar similarly seeks to distract attention from the statutory interpretation question presented here by claiming that its efforts to invoke the MPPAA arbitration procedures were frustrated because the fund "ignored Ferbar's timely Initiation of Arbitration of the dispute." Resp. Br. at 20. Again, the present record is silent on why the arbitration did not take place. In this instance, however, since Ferbar did raise this issue as an affirmative defense in the District Court, it would be open for consideration on remand. J.A. 16. We note that one circumstance that may be relevant to the arbitration defense on remand is that Ferbar began violating its absoulte statutory duty to make withdrawal liability payments pending review *before* its Notice of Initiation of Arbitration was even filed.[6]

(d) Ferbar's suggested revision of MPPAA—to subsume the § 1399(b)(1) "as soon as practicable" period for making the initial assessment within the six-year § 1451(f) limitations period for filing a collection suit—would create the anomalies discussed at pp. 3-7, *supra,* while doing nothing to address the purported problem of delayed initial assessments. For it would be coincidence

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[6] Additional factors that may be relevant to the arbitration issue on remand are that (1) PBGC regulations provide that the commencement of arbitration proceedings after initiation of arbitration is the obligation of *both* parties, who must select an arbitrator within 45 days or agree to extend that period (29 C.F.R. § 4221.4(a)); and (2) PBGC regulations also provide the remedy in the event of delay: "[E]ither party . . . may seek the designation and appointment of an arbitrator in a United States district court pursuant to the provisions of title 9 of the United States Code." 29 C.F.R. § 4221.4(b).

if the six-year period after the withdrawal date turned out to be a good proxy for the time period within which it is practicable to make the initial assessment; obviously in most situations the "practicable" period will be far shorter. Ferbar, after all, complains about an assessment made less than two years, not more than six years, after withdrawal. Thus, unless Ferbar seeks to excise the "as soon as practicable" standard from the statute entirely, this standard will still have force in the vast bulk of cases—and claims of prejudice from delay would still come before arbitrators.

(e) The surface appeal of Ferbar's statutory revision is in Ferbar's claim that its approach would provide a set date after withdrawal after which it is absolutely certain that an employer can raise the statute of limitations as a defense to payment of withdrawal liability. But that claim is false. Although the basic six-year § 1451 (f)(1) limitations period is fixed, the alternative § 1451 (f)(2) limitations period is "3 years after the earliest date on which the plaintiff acquired or should have acquired knowledge of the existence of such cause of action, except that the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." Thus, under Ferbar's revised statute, there would be no date *certain* after which the statute of limitations definitely had run.

The effect of the revision would, as Ferbar recognizes throughout its brief, also be to make § 1451(f)(2) the *basic* limitations provision applicable to many withdrawal liability collection cases. Resp. Br. 24-29. This would substitute litigation as to when trustees "acquired or should have acquired" knowledge of the withdrawal, and whether there was "fraud or concealment" for the straightforward application of a fixed six-year limitations period running from the date payment was due.[7]

[7] Ferbar argues that our interpretation of MPPAA renders § 1451(f)(2) surplussage and therefore should be rejected, because

The salient point in any event is not whether Ferbar's revised MPPAA is superior to the statute Congress drafted—although Ferbar's revision is plainly inferior—but that the statute as it is written makes basic sense. Congress need not provide a fixed limitations period for situations in which one would be inappropriate. *See, e.g. Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977). Laches is a proven doctrine, and there is no reason why a defense similar to laches is not proper in this context. To be sure, the employer who receives an untimely assessment must raise the failure to give timely notice in arbitration, but a statute of limitations is always raised in litigation, so the burden is not appreciably different.[8]

III. CONGRESS DID NOT INTEND TO REJECT SETTLED PRINCIPLES APPLYING STATUTES OF LIMITATIONS TO INSTALLMENT OBLIGATIONS.

Ferbar's remaining contention is that if we are correct that a cause of action to collect an overdue withdrawal liability payment arises (and the limitations period therefore begins to run) on the date a payment is missed, the Court should not follow, as to the remaining payments, the established principles applying statutes of limitations to installment obligations.

§ 1451(f)(2) would have effect only for *some* types of cases under § 1451 rather than all of them. Resp. Br. at 27-29. This Court has rejected the same argument before. *See Patterson v. Shumate*, 504 U.S. 753, 763 ((1992) ("Petitioner's surplussage argument fails. . . . [o]nce petitioner concedes that" the provision would have some effect.). For examples of the variety of § 1451 actions to which the § 1451(f)(2) limitations period might be applicable, *see* Steven R. Bruce, *Pension Claims: Rights and Obligations* 760-62 (2d ed. 1993).

[8] Ferbar does not dispute that plan participants and beneficiaries could sue trustees who fail to promptly assess withdrawal ilability for breach of fiduciary duty under § 1113. Resp. Br. at 33. But Ferbar argues that under our construction of MPPAA they would not be able to sue under § 1451 as well. Even if that were true (which we doubt), we fail to see why one provision authorizing suit against procrastinating trustees would be insufficient.

Before turning to Ferbar's contention on its merits (or more accurately lack thereof), we point out that nothing in this case turns on this point. Ferbar has not disputed that in this case suit was filed within 6 years of the day the first installment payment was actually due, as both MPPAA and the Plan rules provide a 60-day grace period for the initial payment. Pet. Br. at 35; *see also* Resp. Br. at 4 n.2.[9] And, even assuming that this suit was untimely as to the first payment, and that in general the § 1451(f) limitations period *does* begin to run on the remaining withdrawal liability payments as soon as plan trustees, through a proper declaration of a default, could demand those payments, Ferbar has not disputed that in this case the remaining payments could *not* have been demanded more than six years prior to suit. Pet. Br. 33-35.[10]

Having said this, it is nonetheless true that Congress did structure MPPAA's withdrawal liability obligation as a series of installment payments with a provision for acceleration, at the trustees' option, in the event of default. In so doing, Congress legislated against as settled a backdrop for determining how such obligations are treated for limitations purposes as one is likely to find in the law. Pet. Br. at 27-33. There is nothing in MPPAA to suggest that Congress intended different, unique limitations principles crafted by the courts to apply, with the resultant uncertainty that would cause for fund trustees. As this Court has stated in many other contexts, we "should not

[9] The initial notice was sent on December 12, 1986. J.A. 23. The 60-day grace period expired on February 10, 1987. Suit was filed on February 9, 1993. J.A. 6.

[10] Because the fund trustees could not in any event have made the remaining payments due more than six years before suit was filed, the question whether the acceleration clause was properly invoked in this case—and when—need not be reached. In their Complaint, the trustees alleged that the fund was entitled to the full amount due or, in the alternative, the amount of the overdue installments. J.A. 9-11. In its Answer, Ferbar alleged that "Plaintiff did not follow the prescribed default and acceleration procedure." J.A. 17. This is an issue for the District Court on remand.

lightly assume that Congress has intended to depart from established principles." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982).

(a) According to Ferbar, MPPAA does not require payment in installments but instead offers installments as a payment "option" the withdrawing employer affirmatively must select. Resp. Br. at 43-44. That is a gross misstatement of what MPPAA provides. The statute provides that trustees have no choice but to provide for payment in installments over time and that, unless the default procedure can be properly invoked, wait for, and accept periodic payment. The employer's "option" to "*prepay* the outstanding amount of the unpaid withdrawal liability payments" (§ 1399(c)(4) (emphasis supplied)) is exactly what it says it is—an option to pay *sooner* than the statute requires, not an option to reject the periodic payment requirement *without* making any advance payments. And, of course, such a prepayment option does not distinguish the withdrawal liability obligation from other installment obligations, as the debtor generally has an option to pay in advance in mortgage and other installment payment contexts.

Ferbar's contention that traditional principles applying limitations periods to installments govern only where the obligation is contractual has no basis in law or in reason either. The statute of limitations runs separately as to installment obligations because of the character of the obligation (to make a series of payments due on different dates), not because of the character of the source of the obligation. That is why, for example, the limitations period runs payment-by-payment on *judgments* requiring installment payments, the most obvious examples of installment obligations imposed by law rather than agreement. *See, e.g., Kuhn v. Kuhn*, 402 N.E.2d 989, 992 (Ind. 1980); *Miller v. Miller*, 122 F.2d 209 (App. D.C. 1941); *Roberts v. Roberts*, 420 P.2d 864 (Wash. 1996); *Mark v. Safren*, 38 Cal. Rptr. 500 (Cal. App. 1964).

That is also why the basic limitations rule for *statutory* obligations generally is that a plaintiff may recover for each separate statutory violation that occurs within the limitations period, a rule that often leads to separate limitations periods for a series of similar but separate statutory violations. *See* Brief for the United States at 23.

(b) As we read its brief, Ferbar, attempting to distinguish the limitations principles applicable if the *first* withdrawal liability payment is missed from those applicable once that payment is made, contends in essence that not making the first withdrawal payment is a "repudiation" of the entire obligation, bringing the whole sum due and starting the limitations period running. But MPPAA rests on a quite different repudiation concept. The default provisions in the statute, and PBGC regulations, prescribe the circumstances in which future payments can be collected in advance. Those circumstances are that nonpayment is not cured within 60 days after notice to the employer of the delinquency, and that the period for requesting, or if requested, completing, arbitration have passed. § 1399(c)(5); 29 C.F.R. § 4219.31. Thus, the nonpayment of the first installment of withdrawal liability is *not* a default.

Further, even if MPPAA did not speak to the issue, the law is well-settled that a unilateral obligation to pay money in installments cannot be "repudiated," and thereby automatically accelerated, by nonpayment, or even by the debtor's stated determination not to pay at all. Rather, absent an acceleration provision, the creditor still must await each sum as it comes due. Restatement (Second) of Contracts § 243(3) & cmt. c. Otherwise, *every* obligation payable in installments would contain an implied acceleration provision.

(c) As for Ferbar's contentions that traditional limitations principles cannot work in the MPPAA context, it is important to be clear that under MPPAA the resolution of MPPAA disputes over whether an employer is responsible for paying withdrawal liability, and if so, the amount of

liability and schedule for payments proceed on a separate track from actions to collect overdue withdrawal liability payments. In collection proceedings, the validity of the underlying debt is *not* at issue. *See* Pet. Br. at 21; §§ 1399(c)(2), 1401(b)(1), 1401(d).

Thus, an MPPAA collection action will in all likelihood involve fewer issues of evidence or proof than collection actions based on, for example, loans or notes, which are the obligations most frequently payable in installments in the commercial world. That the accepted principles applying limitations periods to installment obligations have stood the text of time in *those* contexts, where the courts do have to determine merits issues in each collection action, demonstrate they would not be unworkable here.

(d) Finally—and Ferbar has a heavy burden here—Ferbar attacks the wisdom of the traditional principles applying statutes of limitations to installment obligations that heretofore seem to have received universal acceptance. Although experience is the best demonstration that those principles are not "absurd" (Resp. Br. at 36 (citation omitted)), the principles also follow from the general rule that the failure of a debtor to make one installment does not entitle the creditor to insist upon the remainder. We know that MPPAA accepts *that* general rule as its starting proposition because MPPAA includes a provision allowing, under specified circumstances, trustees to alter the status quo by declaring a default and accelerating the due date of the remaining installments.[11]

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[11] MPPAA's default provision provides that, upon acceleration, interest on the overdue sum is calculated "from the due date of the first payment which was not timely made" (§ 1399(c)(5)). Ferbar contends the statute of limitations on the remaining payments must run from that date as well. The provision, however, is in terms a provision regarding *only* the calculation of interest, and it simply places the defaulted employer in a worse position in terms of the calculation of interest than if withdrawal liability payments were made on schedule. The provision itself distinguishes the date on which the remaining withdrawal liability payments can actually be demanded ("[i]n the event of *default*, a plan sponsor can require

Ferbar contends, finally, that traditional limitations principles might allow for a "multiplicity of actions," and that this disfavored result must be rejected because "Congressional intent is lacking." Resp. Br. at 38. But that contention is, at bottom, a disagreement with Congress' decision to make the MPPAA acceleration-on-default clause permissive rather than mandatory. As a practical matter, in any event, a suit for collection of overdue withdrawal liability payments is likely to include, as it did here (J.A. 11), a prayer for an injunction to require that the remaining payments be made on schedule, so multiple lawsuits are unlikely. *See, e.g., Galgay v. Beaverbrook Coal Co., supra.*

CONCLUSION

For the foregoing reasons and those set forth in the Brief for the Petitioner, the judgment below should be reversed.

Respectfully submittd,

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immediate payment of the outstanding amount" (§ 1399(c)(5) (emphasis supplied)) from the date from which interest will be calculated if a default occurs and the acceleration provision is in fact exercised. As the Court recognized in *Schlitz*, MPPAA divorces the dates used for calculation of interest from the dates payments are actually made. 115 S.Ct. at 991.

(10)

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In the Supreme Court of the United States

OCTOBER TERM, 1996

BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND, PETITIONER

v.

FERBAR CORPORATION OF CALIFORNIA, INC., AND STEPHEN BARNES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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36 pp

QUESTION PRESENTED

Whether the statute of limitations for an action to collect withdrawal liability under Section 104(2) of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. 1451(f), begins to run on the date an employer withdraws from a pension plan or instead on the date the employer fails to make a scheduled withdrawal liability payment.

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INTEREST OF THE UNITED STATES

The Pension Benefit Guaranty Corporation (PBGC) is the federal agency responsible for administering and enforcing Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, including the provisions added by the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208. PBGC has an interest because this case requires an interpretation of 29 U.S.C. 1451(f), which governs the time for filing a civil action under MPPAA. As we explained in our amicus brief at the petition stage (at 11, 14-15), the date on which the statute of limitations begins to run under 29 U.S.C. 1451(f) for an action to collect withdrawal liability has significant ramifications for the administration of multiemployer plans. In addition, PBGC has an interest in this case because petitioner is an insolvent multiemployer pension plan entitled to receive financial assistance from PBGC under 29 U.S.C. 1431. If

petitioner prevails in this litigation, the PBGC's obligations under 29 U.S.C. 1431 could be reduced.

STATEMENT

1. Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), an employer that withdraws from a multiemployer pension plan is required to pay "withdrawal liability," calculated pursuant to one of four statutory methods for determining the employer's allocable share of the plan's unfunded vested liabilities. 29 U.S.C. 1381, 1391. Withdrawal liability protects the financial stability of multiemployer plans and the retirement income of millions of participants by requiring withdrawing employers to pay a "proportionate share of the plan's 'unfunded vested benefits.'" *Connolly* v. *PBGC*, 475 U.S. 211, 217 (1986) (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984)). By requiring withdrawing employers to pay their fair "share of the plan obligations," *Connolly*, 475 U.S. at 225, Congress ensured that those obligations would not fall on the remaining employers, and thereby discourage new employers from joining the plan or encourage existing employers to withdraw. *Gray*, 467 U.S. at 721-723. Withdrawal liability is thus the cornerstone of Congress's efforts to protect multiemloyer plan participants against benefit losses.

A "complete withdrawal" from a multiemployer pension plan generally occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a).[1] When an employer withdraws from a multiemployer plan, MPPAA requires the plan sponsor (usually a joint labor-management board of trustees, 29 U.S.C. 1002(16)(B)) to "(1) determine the amount of the employer's withdrawal liability, (2) notify the employer of the amount of the withdrawal liability, and (3) collect the amount of the withdrawal liability from the employer." 29 U.S.C. 1382.

[1] An "obligation to contribute" may arise "under one or more collective bargaining (or related) agreements" or "as a result of a duty under applicable labor-management relations law." 29 U.S.C. 1392(a).

"As soon as practicable" after an employer's complete withdrawal, the plan sponsor must notify the employer of "the amount of the liability" and "the schedule for liability payments," and must "demand payment in accordance with the schedule." 29 U.S.C. 1399(b)(1).[2] The schedule must amortize the amount of withdrawal liability in "level annual payments" in accordance with a statutory formula, based roughly on the employer's previous annual contributions to the plan. 29 U.S.C. 1399(c)(1)(A)(i) and (C)(i). For amortization periods that exceed 20 years, the employer's liability usually is limited to the first 20 annual payments. 29 U.S.C. 1399(c)(1)(B) and (D). Each annual payment, in turn, "shall be payable in 4 equal installments due quarterly, or at other intervals specified by plan rules." 29 U.S.C. 1399(c)(3). The Act also permits the employer "to prepay the outstanding amount of the unpaid annual withdrawal liability," plus any accrued interest. 29 U.S.C. 1399(c)(4). See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 418 (1995).

Within 90 days after the employer receives the plan sponsor's notice and demand for payment, the employer is entitled to ask the plan sponsor "to review any specific matter relating to the determination of the employer's

[2] MPPAA also imposes withdrawal liability following an employer's "partial withdrawal." 29 U.S.C. 1381, 1386, 1388(d), 1399(b)(1). Generally, a partial withdrawal occurs on the last day of a plan year if for such plan year "there is a 70-percent contribution decline" or "there is a partial cessation of the employer's contribution obligation." 29 U.S.C. 1385(a).

liability and the schedule of payments." 29 U.S.C. 1399(b)(2)(A). The employer may also "identify any inaccuracy in the determination of the amount of the unfunded vested benefits allocable to the employer," and "furnish any additional relevant information to the plan sponsor." *Ibid.* "After a reasonable review of any matter raised," the plan sponsor must notify the employer of "(i) the plan sponsor's decision, (ii) the basis for the decision, and (iii) the reason for any change in the determination of the employer's liability or schedule of liability payments." 29 U.S.C. 1399(b)(2)(B).

MPPAA then provides that "[a]ny dispute between an employer and the plan sponsor of a multiemployer plan concerning a determination made under [29 U.S.C. 1381-1399] shall be resolved through arbitration." 29 U.S.C. 1401(a)(1). Either party may initiate arbitration within a 60-day period after the earlier of (1) 120 days after the date of the employer's request for review under 29 U.S.C. 1399(b)(2)(A), or (2) the date of notification to the employer of the plan sponsor's decision on the employer's request for review. See 29 U.S.C. 1401(a)(1).[3]

Pursuit of the foregoing statutory remedies does not, however, excuse the employer from making periodic payments as they become due in the meantime. To the contrary, the Act specifically provides that, "notwithstanding any request for review or appeal of determinations of the amount of [withdrawal] liability or of the schedule," the employer's withdrawal liability is "payable in accordance with the schedule set forth by the plan sponsor" beginning no later than 60 days after the date of the plan sponsor's demand. 29 U.S.C. 1399(c)(2). The same point is reiterated in 29 U.S.C. 1401(d), which provides

[3] The parties also may jointly initiate arbitration within the 180-day period after the date of the plan sponsor's demand under 29 U.S.C. 1399(b)(1). See 29 U.S.C. 1401(a)(1).

that "until the arbitrator issues a final decision with respect to the determination submitted for arbitration," the employer is required to make payments in accordance with the plan sponsor's schedule of payments, subject to "any necessary adjustments in subsequent payments for overpayments or underpayments" arising from the arbitrator's decision. If no arbitration proceeding has been initiated within the period prescribed by 29 U.S.C. 1401(a), "the amounts demanded by the plan sponsor under [29 U.S.C. 1399(b)(1)] shall be due and owing on the schedule set forth by the plan sponsor," and "[t]he plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. 1401(b)(1).

In the event of "default," "a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made." 29 U.S.C. 1399(c)(5). A PBGC regulation further provides that, upon default, a plan sponsor may require immediate payment of only a portion of the outstanding amount of the employer's liability. 29 C.F.R. 4219.31(b)(2).[4] If the plan sponsor chooses the latter course, the sponsor must establish a new schedule of payments for the remaining amount. *Ibid.*

The Act defines "default" to include "the failure of an employer to make, when due, any payment under [29 U.S.C. 1399], if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure." 29 U.S.C. 1399(c)(5)(A); see also 29 C.F.R. 4219.31(b)(1)(i).[5] In addition, PBGC regulations

[4] Prior to July 1, 1996, regulations promulgated under MPPAA by PBGC appeared at 29 C.F.R. Pts. 2640-2677.

[5] The term "default" also includes "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an

set forth rules that apply to an employer's obligation to make withdrawal liability payments during the period for plan sponsor review and arbitration. In those instances, a default triggered by a failure to make payments does not occur until the sixty-first day after the last of (1) the expiration of the 90-day period within which the employer may request review under 29 U.S.C. 1399(b)(2)(A); (2) if review is requested within those 90 days, the expiration of the period within which arbitration may be initiated under 29 U.S.C. 1401(a)(1); or (3) if arbitration is timely initiated, the date the arbitrator issues a decision. 29 C.F.R. 4219.31(c)(1).[6]

MPPAA authorizes civil actions to enforce its various provisions. It provides that a plan fiduciary, employer, plan participant, or beneficiary "who is adversely affected by the act or omission of any party" under MPPAA with respect to a multiemployer plan "may bring an action for appropriate legal or equitable relief" in federal court. 29 U.S.C. 1451(a)(1) and (c). Such an action is barred, however, "after the later of—(1) 6 years after the date on which the cause of action arose, or (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action." 29 U.S.C. 1451(f).

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employer will be unable to pay its withdrawal liability." 29 U.S.C. 1399(c)(5)(B); see also 29 C.F.R. 4219.31(b)(1)(ii).

[6] Installments due before the expiration of the period described in 29 C.F.R. 4219.31(c)(1) must be paid in accordance with the schedule established by the plan sponsor. 29 C.F.R. 4219.31(c)(2). Any payment not so made is "overdue," and interest accrues from the date of the missed payment. *Ibid.*; see also 29 C.F.R. 4219.31(a), 4219.32(a)(1) and (d).

2. For several years, respondent Ferbar Corporation (Ferbar) contributed to the Bay Area Laundry and Dry Cleaning Pension Trust Fund (Fund). In March 1985, Ferbar ceased making contributions to the Fund. On December 12, 1986, the Fund sent Ferbar a notice assessing a withdrawal liability obligation of $45,580.80. Pet. App. 2a. The notice stated that Ferbar could discharge its withdrawal liability obligation by paying the total amount within 60 days of receipt of the letter, or by making monthly installment payments of $345.50 for 240 months (with a final payment of $344.96), beginning February 1, 1987. *Id.* at 2a-3a; Compl. ¶ 14; C.A. E.R. Tab 13. Ferbar made no payments in response to the Fund's demand.

In a letter dated February 27, 1987, Ferbar requested that the Fund review its assessment of withdrawal liability. In a letter dated April 14, 1987, the Fund notified Ferbar that its first payment was delinquent and that Ferbar had 60 days from the date of that notice to cure the delinquency, or it would be considered in default. Pet. App. 3a. Ferbar failed to cure its delinquency. In a letter dated April 28, 1987, however, Ferbar referred to its previous response and asked when the Fund's answer would be forthcoming. *Ibid.*; Br. in Opp. 6. In a letter dated July 8, 1987, Ferbar requested arbitration of its disputed withdrawal liability. Pet. 5. No arbitration proceedings were held, and Ferbar did not make any withdrawal liability payments. Pet. App. 7a; Br. in Opp. 6.

On February 9, 1993, petitioner, the Board of Trustees of the Fund, filed a complaint against Ferbar and its principal shareholder, Stephen J. Barnes, in the United States District Court for the Northern District of California to collect the employer's withdrawal liability.[7]

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[7] Petitioner also sued Ferreira Farms, Inc., and Diablo Cleaners, Inc., two dry cleaners, and Robert J. Ferreira, a shareholder in Ferreira Farms, Diablo Cleaners, and Ferbar. Compl. ¶¶ 7-10. On

The parties filed cross-motions for summary judgment on whether the statute of limitations had expired. Pet. App. 6a-7a. On May 9, 1994, the district court granted summary judgment in favor of respondents. *Id.* at 6a-19a. The court first held that the suit was barred by the three-year limitations period set forth in 29 U.S.C. 1451(f)(2), because "plaintiffs knew a cause of action existed no later than 1987, yet filed their complaint in excess of three years of that time." Pet. App. 11a (citation omitted). In the alternative, the court held that the Fund's action was barred by the six-year limitations period set forth in 29 U.S.C. 1451(f)(1). Pet. App. 11a-18a. The court reasoned that the Fund was "adversely affected when the first monthly payment was not made" by the February 1, 1987 due date and, therefore, that the Fund's "cause of action arose and, concomitantly, the statute of limitations began running," on February 1, 1987. *Id.* at 13a. Because February 1, 1987, "preced[ed] the filing of the lawsuit by more than six years," the court concluded that the action was time-barred. *Id.* at 18a.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1a-5a. The court of appeals first held that the district court erred in relying on the three-year limitations period set forth in 29 U.S.C. 1451(f)(2). The court explained that "[t]he district court misread the plain language of [29 U.S.C.] 1451(f), which clearly directs courts to apply 'the later of' the two periods of limitations." Pet App. 3a. "On the facts of this case," the court concluded, the later limitations period "is six years from the date the cause of action arose." *Ibid.*

Turning to the district court's alternative holding that the Fund's cause of action became time-barred six years after February 1, 1987, the date on which the employer

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June 3, 1994, those defendants were dismissed from the complaint. C.A. E.R. Tab 31.

drawal liability as required by the Act. And, unless a plan sponsor accelerates the entire debt following an employer's default, the plan sponsor has a separate cause of action on the date each payment becomes due. That is the usual rule for installment payments in other settings, and there is no reason for a different rule under MPPAA.

In this case, beginning on February 1, 1987, respondent failed to pay its monthly withdrawal liability installments as required by the plan sponsor's schedule, and respondent's debt has not been accelerated under the Act. Thus, petitioner's complaint, filed February 9, 1993, is time-barred with respect to respondent's first missed installment payment on February 1, 1987, but is timely with respect to installment payments falling due thereafter.

A. A Plan Sponsor's Cause of Action For Collection of Withdrawal Liability Arises on The Date The Employer Fails to Make a Withdrawal Liability Payment

1. "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989); see also *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); *United States* v. *Morton*, 467 U.S. 822, 828 (1984). Thus, "when a 'cause of action' first 'accrues'" for purposes of a statute of limitations must be determined "in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 517 (1967) (quoting *Reading Co.* v. *Koons*, 271 U.S. 58, 62 (1926)). It is also settled that statutes of limitations do not begin to run until there is "a complete and present cause of action."

Rawlings v. *Ray*, 312 U.S. 96, 98 (1941);[8] see also *Clark* v. *Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1874) ("All statutes of limitation begin to run when the right of action is complete[.]"). "A cause of action is created when there is a breach of duty owed the plaintiff." *Unexcelled Chem. Corp.* v. *United States*, 345 U.S. 59, 65 (1953). See also *United States* v. *Lindsay*, 346 U.S. 568, 569 (1954) ("a right accrues when it comes into existence").

MPPAA authorizes a plan fiduciary to file suit whenever the plan is "adversely affected by the act or omission of any party" and permits such suits to be filed within "6 years after the date on which the cause of action arose." 29 U.S.C. 1451(a) and (f)(1).[9] In an action by a plan sponsor to collect withdrawal liability payments, it is the employer's failure to make a scheduled payment that is the "act or omission" that "adversely affect[s]" the plan in the relevant sense and thus gives rise to the cause of action under Section 1451. Respondent argues (Br. in Opp. 14-15) that a plan sponsor's cause of action arises on the date of an employer's withdrawal because the fund is "adversely affected" by the withdrawal. Respondent points to a congressional finding under MPPAA that "withdrawals of

[8] In *Rawlings*, the Court held that a bank receiver's cause of action to collect an assessment by the Controller of the Currency against one of the bank stockholders accrued not on the date of assessment but "the date fixed for payment." 312 U.S. at 98. The Court explained that "the statute of limitations did not begin to run" until the debt was actually due because "prior thereto suit could not be maintained against him." *Ibid*.

[9] A suit also is timely under the Act if it is brought within "3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action." 29 U.S.C. 1451(f)(2). Because Section 1451(f)'s time-bar applies "the later of" the periods set forth in Section 1451(f)(1) and Section 1451(f)(2), the six-year accrual provision applies in this case. Pet. App. 3a.

contributing employers * * * frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan." 29 U.S.C. 1001a(a)(4)(A). MPPAA addresses that very problem, however, by imposing withdrawal liability according to a prescribed formula and procedures. See 29 U.S.C. 1381, 1399; *Connolly* v. *PBGC*, 475 U.S. 211, 214-217 (1986). If the employer makes scheduled payments to the plan as required by the Act, the plan is not "adversely affected" within the meaning of 29 U.S.C. 1451(a). A plan is "adversely affected" under the statutory scheme, and a cause of action therefore accrues, only when the employer fails to make scheduled payments when they fall due.

"Withdrawal, in itself, does not visit any adverse effect upon the plan that gives rise to the cause of action," but "merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment." *Joyce*, 871 F.2d at 1123, 1124. That is so because an employer does not owe any withdrawal liability on the date of its withdrawal from the plan. See *Milwaukee Brewery Workers' Pension Plan* v. *Jos. Schlitz Brewing Co.*, 513 U.S. 414, 423 (1995) ("[T]he statute makes clear that the withdrawing employer owes nothing until its plan demands payment.").[10] MPPAA provides that, "[a]s soon as practicable" *following* a withdrawal, the plan sponsor must establish a schedule of payments in accordance with the Act. 29 U.S.C.

[10] In *Milwaukee Brewery*, the pension plan argued that an employer's withdrawal liability payment schedule included interest for the year in which withdrawal occurred. In rejecting that contention, the Court observed that the "withdrawing employer's debt does not arise" at the time of withdrawal, because "the statute makes clear that the withdrawing employer owes nothing until its plan demands payment." 513 U.S. at 423.

1399(b)(1).[11] The first payment is not due until as much as 60 days after the plan sponsor sets that schedule. 29 U.S.C. 1399(c)(2); see 29 U.S.C. 1399(c)(1)(A)(i) ("Actual payment shall commence in accordance with paragraph (2)."). Thus, "MPPAA contemplates that an employer sometimes may pay its actual first installment long after the withdrawal year." *Milwaukee Brewery*, 513 U.S. at 426.

An employer's withdrawal by itself does not breach any statutory duty owed to the plan or violate MPPAA, and petitioner does not claim otherwise. Rather, petitioner filed suit to collect payments of statutory withdrawal liability that were not made. Thus, the employer's failure to pay its withdrawal liability, as required by 29 U.S.C. 1399(c)(1)(A)(i) and (c)(2), constitutes the breach of duty and the "violation giving rise to the action." *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989). Accordingly, it is not until an employer fails to pay its withdrawal liability when due that a plan sponsor is "adversely affected" by an "act or omission" of the withdrawing employer, 29 U.S.C. 1451(a), and it is only then that the plan sponsor has a cause of action to collect the withdrawal liability.

2. Under the Ninth Circuit's analysis, the statute of limitations always begins to run before the plan is entitled to file suit. The Ninth Circuit's decision is therefore inconsistent with the established principle that "the statute

[11] MPPAA imposes withdrawal liability only for the employer's allocable share of the plan's "unfunded vested benefits," which may be zero. 29 U.S.C. 1391(b). Moreover, other provisions of the Act reduce or eliminate the amount of the employer's withdrawal liability. For instance, in certain cases, withdrawal liability is not imposed for temporary contribution obligation periods, 29 U.S.C. 1390, and liability is reduced upon certain asset sales or the employer's insolvency, 29 U.S.C. 1405. See also 29 U.S.C. 1389 (de minimis rule).

of limitations will [not] be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602 (1887). See also *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute."); see generally 51 Am. Jur. 2d *Limitation of Actions* § 107 (1970) ("no limitation commences to run against any demand until the obligation or demand is due and payable, in the sense that it is defined sufficiently to be capable of enforcement").

Indeed, a rule that begins the statute of limitations at the time of withdrawal would effectively prevent plan sponsors from collecting any unpaid installment payments that may become due more than six years after the date of the employer's withdrawal. For example, under a withdrawal-accrual rule, a plan sponsor that received timely installment payments throughout the six years following the employer's withdrawal would be time-barred from bringing a collection action even if the employer thereafter ceased making payments in the seventh year. That result cannot be reconciled with the Act's express provision for a payment schedule that may extend as long as 20 years, 29 U.S.C. 1399(c)(1)(B), and would undermine MPPAA's "ultimate aim that workers receive pension payments which they have duly earned." *Joyce*, 871 F.2d at 1126. Thus, the limitations period in 29 U.S.C. 1451(f)(1) does not require plan sponsors to bring an action to collect withdrawal liability within six years following the employer's withdrawal from a plan.

3. The employer's failure to pay the sum due on a date certain as specified by the plan's schedule under 29 U.S.C. 1399(c)(2) is a discrete event. See also 29 C.F.R. 4219.31(a) ("a withdrawal liability payment is overdue if it is not paid on the date set forth in the schedule of payments established by the plan sponsor"). For that reason, a rule that commences a plan sponsor's collection action at the time of the employer's failure to pay is precisely the type of "firmly defined, easily applied rule[]" that a statute of limitations demands, *Wilson* v. *Garcia*, 471 U.S. 261, 266 (1985) (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)), and it furthers "[p]redictability, a primary goal of statutes of limitations." *Owens* v. *Okure*, 488 U.S. 235, 240 (1989).[12]

By contrast, tying the statute of limitations to the employer's withdrawal would make the threshold determination whether the limitations period has expired turn on the more complicated question whether and when an employer completely withdrew under the Act. Under MPPAA, an employer's "complete withdrawal" generally occurs when an employer "(1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." 29 U.S.C. 1383(a). "[T]he date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." 29 U.S.C. 1383(e). The determination whether and when a statutory withdrawal

[12] Although the employer may contest the plan sponsor's calculation of liability, 29 U.S.C. 1399(b)(2)(A), 1401(a), MPPAA requires the employer to pay the installments according to the plan's schedule pending the resolution of any dispute, see 29 U.S.C. 1399(c)(2), 1401(d); 29 C.F.R. 4219.31(c)(2). That "'pay now, dispute later' feature of MPPAA * * * functions to preserve plan cash flow and to thwart the use of dilatory tactics by employers." *Debreceni* v. *Merchants Terminal Corp.*, 889 F.2d 1, 5 (1st Cir. 1989) (quoting *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 800 F.2d 641, 642 (7th Cir. 1986)).

has occurred, however, "cannot necessarily be made upon complete withdrawal; rather, it requires a post hoc determination of when a particular cessation of covered operations, for example, actually signaled a permanent halt to (rather than a lull in) operations." *Joyce*, 871 F.2d at 1123. Further, the Act provides that certain cessations of operations or obligations to contribute do not result in statutory withdrawals. For example, withdrawal does not occur upon an employer's sale of assets if certain statutory conditions are satisfied. See 29 U.S.C. 1384. Similarly, withdrawal does not occur if "an employer ceases to exist by reason of * * * a change in corporate structure" where the successor continues to contribute to the plan, or if "an employer suspends contributions under the plan during a labor dispute involving its employees." 29 U.S.C. 1398. A plan sponsor may also disregard any transaction a principal purpose of which "is to evade or avoid liability" under the Act. 29 U.S.C. 1392(c).

In addition, special rules apply to particular employers and plans. If a plan primarily covers work in the building and construction industry, a construction employer withdraws only if the employer ceases to have an obligation to contribute under the plan and either (1) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or (2) "resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption." 29 U.S.C. 1383(b)(2)(B).[13] Employers in the entertainment industry

[13] Because a plan sponsor may not be able to determine whether a building and construction employer has withdrawn from a plan until five years after the time of withdrawal, the Ninth Circuit's decision in *Board of Trustees of Construction Laborers* v. *Thibodo*, 34 F.3d 914 (1994), cert. denied, 514 U.S. 1017 (1995), held that the limitations

that participate in plans primarily covering that industry are subject to similar provisions. 29 U.S.C. 1383(c).[14]

The treatment of entities under "common control" further compounds the uncertainty associated with the determination whether and when a withdrawal has occurred. Section 1301(b)(1) of Title 29, U.S.C., provides that "all employees of trades or businesses * * * under common control shall be treated as employed by a single employer." See 29 C.F.R. 4001.3. Thus, a plan sponsor must determine whether an employer is a member of a controlled group and, if so, whether the controlled group as a whole has effectuated a withdrawal under the Act. See generally *Robbins* v. *Pepsi-Cola Metro. Bottling Co.*, 636 F. Supp. 641, 648-660 (N.D. Ill. 1986).

Moreover, a plan sponsor may not securely rely on its own determination of when an employer's actions constitute a statutory withdrawal, for the plan sponsor's determination is subject to review by an arbitrator and then the courts. 29 U.S.C. 1401, 1451; cf. *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 630 (1993) (date of an employer's complete withdrawal is a "mixed question of fact and law"). Thus, the rule fashioned by the decision below would subject parties and the courts to needless litigation over when a cause of action under MPPAA arose, and would

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period for a suit against such an employer does not begin to run until "the statutory conditions for withdrawal are met." Pet. App. 28a-29a.

[14] In addition, if substantially all contributions to a plan are made by employers "primarily engaged in the long and short haul trucking industry, the household goods moving industry, or the public warehousing industry," withdrawal does not occur unless PBGC "determines that the plan has suffered substantial damage to its contribution base as a result of [an employer's cessation of operations or obligation to contribute]," or the employer fails to furnish a bond "in an amount equal to 50 percent of the withdrawal liability of the employer." 29 U.S.C. 1383(d).

"create, at the least, an unwieldy statutory collection mechanism." *Joyce*, 871 F.2d at 1124; cf. *Wilson*, 471 U.S. at 275 (assuming that "Congress intended the identification of the appropriate statute of limitations [under 42 U.S.C. 1983] to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty, and unproductive and ever-increasing litigation").

4. Accrual of a plan sponsor's collection action at the time of withdrawal is not necessary to advance the purpose of a statute of limitations to "put defendants on notice of adverse claims and * * * prevent plaintiffs from sleeping on their rights." *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983); see also *Klehr* v. *Smith Corp.*, No. 96-663 (June 19, 1997), slip op. 6-7. MPPAA mandates that a plan sponsor notify the employer of the amount of its withdrawal liability and demand payment according to a schedule "[a]s soon as practicable" following the plan sponsor's determination that a complete withdrawal has occurred. 29 U.S.C. 1399(b)(1). A plan fiduciary further must discharge its duty "solely in the interest of the [plan's] participants and beneficiaries." 29 U.S.C. 1104(a)(1).

Because a plan fiduciary must act with reasonable promptness in notifying an employer of its withdrawal liability obligations under MPPAA, there is no force to the Ninth Circuit's concern (Pet. App. 27a) that a rule that defers accrual of a collection suit until after an unmet demand for payment "improperly places the running of the limitations period in the control of the plaintiff." A plan sponsor that unduly delays in notifying the employer of its liability "puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty." *Joyce*, 871 F.2d at 1126. The passage of time also makes it less likely that a plan fiduciary will be able to collect against insolvent or defunct employers, like respondent. See Br.

in Opp. 5. And, of course, the longer a plan sponsor waits to collect withdrawal liability, the less investment earnings the plan may obtain on the funds once collected.[15] In any event, it makes little sense to craft a rule of limitations predicated solely on the hypothetical possibility that a particular plan fiduciary might not comply with its statutory and fiduciary duties to protect the plan's interests. See *Central States Pension Fund* v. *Central Transp., Inc.*, 472 U.S. 559, 571 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries"); cf. *FDIC* v. *Henderson*, 61 F.3d 421, 426 (5th Cir. 1995) ("the law usually presumes that directors will exercise their fiduciary duties"); *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties"). Accordingly, the reasons advanced by the Ninth Circuit to support a withdrawal-accrual rule lack merit.[16]

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[15] In addition, some courts have held that an employer that is prejudiced by a plan sponsor's failure to demand withdrawal liability "as soon as practicable" following the employer's withdrawal may assert the plan sponsor's delay as a defense in arbitration. See, *e.g.*, *Joyce*, 871 F.2d at 1126-1127.

[16] The Ninth Circuit's decision in *Thibodo* also relied on MPPAA's three-year discovery-accrual provision, 29 U.S.C. 1451(f)(2). See note 9, *supra*. The Ninth Circuit believed that "[t]here is little reason" for the discovery-accrual provision "if the cause of action does not come into existence until demand for payment is made and refused." Pet. App. 28a. Like the claim-accrual provision in 29 U.S.C. 1451(f)(1), however, the discovery-accrual provision applies to any "act or omission of any party under [29 U.S.C. 1381-1453]." See 29 U.S.C. 1451(a). In addition to actions under MPPAA's withdrawal-liability provisions, 29 U.S.C. 1381-1405, MPPAA's time-bar applies to actions under the Act's provisions for mergers and other transfers of plan assets (29 U.S.C. 1411-1415), reorganization status and minimum contribution requirements

B. Petitioner's Cause of Action is Timely as to Payments Falling Overdue Within Six Years Before The Filing of The Complaint

1. Because a plan sponsor's cause of action does not arise on the date of the employer's withdrawal, the Ninth Circuit's decision affirming the dismissal of petitioner's complaint was in error. Petitioner filed its complaint on February 9, 1993, more than six years following the employer's first missed installment payment on February 1, 1987, but less than six years following the employer's next scheduled payment. The fact that petitioner did not file suit within six years after the employer's first missed payment on February 1, 1987, does not bar petitioner's suit insofar as it seeks to collect the remaining delinquent installments.

A plaintiff generally may recover damages caused by each statutory violation occurring within the limitations period. See, *e.g.*, *Klehr*, slip op. 8-9 (noting decisions under civil RICO); *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971) (Clayton Act); *Ashley* v. *Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (Title VII and Equal Pay Act); *Knight* v. *Columbus, Ga.*, 19 F.3d 579, 582 (11th Cir.) (Fair Labor Standards Act), cert. denied, 513 U.S. 929 (1994); *State Farm Mut. Auto. Ins. Co.* v. *Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (Kennedy, J., concurring) (noting rule under Section 1983 actions). For example, in a plan fiduciary's suit against an employer for failure to make monthly contributions to a multiemployer plan in violation of 29 U.S.C. 1145, "[t]he limitations period runs against each monthly right of

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(29 U.S.C. 1421-1424), and benefits after termination of plans (29 U.S.C. 1441). Accordingly, because the discovery-accrual provision "extends to matters far beyond collection of withdrawal liability," that provision "retains independent significance" even if a collection suit accrues at the time of nonpayment. *Joyce*, 871 F.2d at 1125.

action separately." *Trustees for Alaska Laborers* v. *Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987).[17] Similarly here, an employer that fails to pay any installment payment according to the schedule set forth by the plan sponsor, 29 U.S.C. 1399(c)(2), has violated MPPAA, and each missed payment by the employer constitutes a separate violation of the Act. A plan sponsor "adversely affected" by each missed payment thus has a separate cause of action under 29 U.S.C. 1451(a) with respect to that payment, and may "recover the payments due during the six years preceding the filing of its lawsuit." *Kahle Eng'g*, 43 F.3d at 857.

2. The law is well settled that, "[i]n the case of an obligation payable by instalments, the statute of limitations runs against each instalment from the time it becomes due," even though "the debtor has the option to pay the entire indebtedness at any time." 51 Am. Jur. 2d *Limitation of Actions* § 133 (1970); see also 1 C. Corman, *Limitation of Actions* § 7.2.9 (1991) ("Default on money obligations that are payable in installments creates a separate cause of action, with its concomitant statute of limitations, against each installment as it becomes due.").[18] Moreover, "where there is an acceleration clause

[17] MPPAA provides that, in any action "to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution [under 29 U.S.C. 1145]." 29 U.S.C. 1451(b); see also 29 U.S.C 1401(d). It therefore is especially appropriate that the same limitations rule should apply to delinquent contributions and delinquent payment of scheduled withdrawal liability installments.

[18] That principle applies whether the obligation is imposed by contract or by federal statute. See, *e.g.*, *Waggoner* v. *Dallaire*, 649 F.2d 1362, 1368 (9th Cir. 1981) (suit under Section 301(a) of Labor Management Relations Act (29 U.S.C. 1144) to collect delinquent monthly trust contributions); *Russell* v. *United States*, 314 F.2d 809, 811 (Ct. Cl. 1963) (suit to collect periodic pay claims under Officer Personnel Act of

giving the creditor the right upon certain contingencies to declare the whole sum due, the statute begins to run, only with respect to each instalment, at the time the instalment becomes due, unless the creditor exercises his option to declare the whole indebtedness due, in which case the statute begins to run from the date of the exercise of his option." 51 Am. Jur. 2d *Limitation of Actions* § 133 (1970); see also 1 Corman, *supra*, § 7.2.9; 4 A. Corbin, *Contracts* § 951 (1951); 18 S. Williston, *A Treatise on the Law of Contracts* §§ 2026C, 2027 (3d ed. 1978).[19]

Under those principles, unless a plan sponsor has elected to accelerate the employer's debt under 29 U.S.C. 1399(c)(5), a separate cause of action arises on the date each payment becomes overdue. In this case, respondent does not contend that its debt was accelerated by petitioner.[20] Accordingly, petitioner's suit to collect the February 1, 1987 missed payment is time-barred, but the

1947); *Davis* v. *Alabama Power Co.*, 383 F. Supp. 880, 893-894 (N.D. Ala. 1974) (suit for wages under Military Selective Service Act of 1967), aff'd, 542 F.2d 650 (5th Cir. 1976), aff'd, 431 U.S. 581 (1977); see also cases cited at note 19, *infra*.

[19] See, *e.g.*, *United States* v. *Dos Cabezas Corp.*, 995 F.2d 1486, 1490-1491 (9th Cir. 1993); *United States* v. *Alessi*, 599 F.2d 513, 515 (2d Cir. 1979); *Snyder* v. *Madera Broadcasting, Inc.*, 872 F. Supp. 1191, 1197 (E.D.N.Y. 1995); *RTC* v. *Koock*, 867 F. Supp. 284, 288 (E.D. Pa. 1994); *United States* v. *LaFrance*, 728 F. Supp. 1116, 1119-1120 (D. Del. 1990) (collecting authorities).

[20] The result in this case would be the same even if respondent's entire debt had been accelerated (notwithstanding respondent's pending request for arbitration, see 29 C.F.R. 4219.31(c)(1)), and even if the limitations period with respect to all remaining amounts due began to run on the first date on which petitioner was *authorized* to accelerate payments following a default. The earliest date on which petitioner could have accelerated respondent's entire liability was 60 days after respondent received petitioner's April 14, 1987 notice. 29 U.S.C. 1399(c)(5); see page 7, *supra*. That date was less than six years prior to petitioner's filing of its complaint.

complaint is timely filed as to all missed installment payments falling due thereafter. Cf. Compl. ¶¶ 26, 27 (seeking the entire amount of withdrawal liability or, alternatively, the amount of the delinquent monthly payments owed between February 1987 and the time of trial).

In ruling to the contrary, the court below reasoned that because respondent "never agreed to the installment plan proposed by the Fund and made no installment payments," respondent did not enter into a "new contract to pay off the withdrawal liability." Pet. App. 5a n.4; see also *Navco*, 3 F.3d at 172 ("the employer did *not* assent to a longer [installment] period for payment and suit"). An employer's lack of consent, however, cannot overcome MPPAA's express statutory command that an employer discharge its withdrawal liability debt "in * * * equal installments." 29 U.S.C. 1399(c)(3). Those installments may extend as long as 20 years. 29 U.S.C. 1399(c)(1)(B). This Court has explained that the "installment method" of payment furthers MPPAA's goal of "maintaining level funding for the plan." *Milwaukee Brewery*, 513 U.S. at 418-419. Thus, unless the employer prepays its withdrawal liability debt, 29 U.S.C. 1399(c)(4), MPPAA does not permit an employer to opt out of its installment obligations.

Similarly, the notion that a fund has "only one *claim* against the employer," *Navco*, 3 F.3d at 172, is inconsistent with the provisions of MPPAA relating to default and acceleration. A plan sponsor may "require immediate payment of the outstanding amount of an employer's withdrawal liability" only "[i]n the event of a default." 29 U.S.C. 1399(c)(5). Default does not occur under the Act unless the failure to pay is not cured by the employer within 60 days after it receives written notification from the plan sponsor that payment is overdue. 29 U.S.C. 1399(c)(5)(A); 29 C.F.R. 4219.31(b)(1)(i). Moreover, default "shall not occur" until as much as 60 days after arbitration has concluded. 29 C.F.R. 4219.31(c)(1). Thus, unless the employer has failed after 60 days to cure a prior delinquency, and until the period in which arbitration may occur has passed, the plan sponsor may neither demand payment for the entire outstanding amount of the employer's withdrawal liability nor bring a collection suit under the Act for the full amount. Given those restrictions on demanding payment of the entire amount of unpaid liability, a cause of action to recover the entire amount of withdrawal liability cannot arise under 29 U.S.C. 1451(f) at the time of the employer's first missed installment payment. See *Borer*, 119 U.S. at 602; cf. *Crown Coat*, 386 U.S. at 511-512 (government contractor's claim for equitable adjustment under six-year limitations period, 28 U.S.C. 2401(a), accrued only after exhaustion of administrative appeals because only then could contractor file suit in court).[21]

For the foregoing reasons, unless a plan sponsor has accelerated payment of the employer's entire debt following the employer's default, the plan sponsor's cause of action does not run with respect to all installment payments on the date of the first missed payment. Petitioner's suit is therefore timely as to all missed installments falling due within the limitations period.

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[21] Even upon the employer's default, the outstanding amount of the withdrawal liability is not "presumptively due at the outset" (*Navco*, 3 F.3d at 172), because the Act places the decision to accelerate some or all of the outstanding liability within the discretion of the plan sponsor. 29 U.S.C. 1399(c)(5); 29 C.F.R. 4219.31(b)(2). Indeed, a rule that imposes an "[a]utomatic default on the entire balance from the date of the first missed payment discourages amicable resolution of disputes and discourages reentry into the fund as a contributing employer." *Kahle*, 43 F.3d at 859.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,
v.
FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves this Court for leave to file the accompanying Brief *Amicus Curiae* in which we urge the Court to review the decision below.

At issue in this request for review is the proper construction of the statute of limitations provision of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), an issue over which three separate approaches exist as a result of conflicting rulings in the District of Columbia and Third Circuits, the Seventh Circuit, and now the Ninth Circuit. As a misreading of the

6-year limitations period can substantially curtail the ability of multiemployer plans to collect withdrawal liability, the Ninth Circuit's ruling, which takes the most restrictive approach and is therefore least favorable to plans, raises an issue of great national importance affecting the multiemployer plan community, generally, the participants and beneficiaries of multiemployer pension plans, employers who continue to select multiemployer pension plans as the vehicle for providing pension benefits, and the public at large which may be presumed to have a significant interest in workers' receiving their anticipated benefits upon retirement. As will be discussed further below, the NCCMP is well equipped to advise the Court on the issues raised by the Ninth Circuit's ruling and therefore files this Motion, as Petitioner has consented to the filing of an *amicus* Brief, but Respondent has not. The letters granting and refusing the NCCMP's request for consent have been filed with the Clerk of the Court.

INTEREST OF THE NCCMP

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans not only represent a majority of participants in multiemployer plans throughout the nation, but are also representative of the multiemployer plan community generally.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* before the Supreme Court of the United States as well as before the various courts of appeals. With regard to withdrawal liability assessments under MPPAA,[1] the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PBGC v. R.A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP also filed an *amicus* brief in *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994), which addressed the precise issue at bar. In addition, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980), and S10100 (daily ed. July 29, 1980).

In the present case, the NCCMP respectfully requests this Court to clarify the operation of the 6-year statute of limitations applicable to actions to collect withdrawal liability under MPPAA.

Congress chose not to include a statute of limitations provision applicable to actions to collect delinquent contributions under Title I of ERISA. However, Congress clearly intended that actions to collect withdrawal liability under Title IV of the statute should be subject to a uniform limitations period. However, in spite of the text of the statute, this has not occurred, and the decision below heightens the division of opinion which now exists among the courts of appeals which have issued rulings construing MPPAA's statute of limitations provision; *e.g.*, the Court of Appeals for the District of Columbia Circuit,[2] the Third

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[1] ERISA was amended in 1980 by MPPAA, Pub. L. 96-364, 94 Stat. 1208 (1980).

[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989).

Circuit,[3] the Seventh Circuit[4] and the Ninth Circuit. As a result of the conflict, three separate and distinct approaches now exist, two of which (those of the Ninth and Seventh Circuits) substantially curtail the trustees' enforcement rights and limit their discretion to act in the best interests of a plan and its participants and beneficiaries.[5]

The NCCMP is concerned that without this Court's review of the Ninth Circuit's opinion, further misreadings of the statute will occur, and hence further divisions of opinion. More specifically, the NCCMP is concerned that if either the Ninth or the Seventh Circuit's approach is adopted by those courts of appeals which have not yet addressed the statute of limitations issue, or by district courts in the absence of binding appellate precedent, the statutory scheme for collecting withdrawal liability will be substantially undermined, and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to re-enter the plan under the statute's abatement rules will be substantially impeded unless they retain the statutory discretion *not* to declare a default and accelerate the debt.

Since the above results are inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all of their affiliated pension plans, requests leave to file an *amicus* brief in support of the Petition for *Certiorari*. In analyzing the conflicting circuit court opinions, the NCCMP will focus its discussion upon the practical consequences which a misreading of MPPAA's statute of limitations will have on multiemployer plans, a topic on which the NCCMP is uniquely able to provide information.

Respectfully submitted,

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[3] *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] While the Court of Appeals for the First Circuit rejected an employer's contention that a notice and demand for payment must be made within six years of a withdrawal, it did not have occasion to weigh in with respect to the precise conflict between the District of Columbia and Third Circuits, on the one hand, and the Seventh Circuit, on the other. *Giroux Bros. Transportation v. New England Teamsters & Trucking Industry Pension Fund*, 73 F.3d 1 (1st Cir. 1996). Rather, the timeliness question reviewed by the court of appeals was whether the trustees had issued to an employer a notice and demand for payment of withdrawal liability "as soon as practicable," a question which the court held was arbitrable. Nevertheless, the reasoning of the court suggests that, as a matter of policy, it would favor an approach that would *not* prematurely cut off the trustees' collection rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-370

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,

Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

Section 1451(a)[1] of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA"), permits a plan fiduciary who is aggrieved by an "act or omission" with respect to the plan to file an action for legal or equitable relief, or both. Section 1451(f)(1) requires such an action to be brought within six years of the date on which the cause of action arose. The question presented in this request for review is whether MPPAA affords the trustees of multiemployer pension plans more than one cause of action to collect withdrawal liability and, if so, when these causes arise for purposes of applying the 6-year statute of limitations.

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[1] Further references to MPPAA will be to Title 29, U.S.C.A.

As both Congress and this Court have recognized, uniform rules for the governance of multiemployer plans are of critical importance for the sound, cost-effective administration of these plans. To the extent federal courts of appeals differ in their construction of MPPAA, however, the objective of national uniformity is frustrated. The Ninth Circuit's ruling heightens the division of opinion which now exists among the courts of appeals which have issued rulings expressly construing MPPAA's statute of limitations provision; *e.g.*, the Court of Appeals for the District of Columbia Circuit,[2] the Third Circuit,[3] the Seventh Circuit [4] and now the Ninth Circuit. As a result, three distinct approaches now exist which urgently require resolution.

In the case at bar, the Ninth Circuit ruled that MPPAA's 6-year statute of limitations begins to run as of the date of withdrawal, rather than as of the date an employer fails to make a payment demanded by the trustees.[5] The court so ruled even though a plan cannot determine—as of the date of withdrawal—whether the employer has *any liability* as a result of the withdrawal and cannot assert a legal claim to payment as of that date. As a significant amount of time is likely to elapse before a plan is able to determine with reasonable certainty that a withdrawal has occurred, calculate the resulting liability (if any), prepare a payment schedule, and issue a notice and demand for payment, the Ninth Circuit's ruling will result in trustees' having far less than six years either to

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[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 918 (1989).

[3] *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] The court felt bound by another panel's ruling in *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1361, 131 L.Ed.2d 217 (1995).

collect scheduled payments or to declare a default and collect the accelerated debt. Moreover, because the statute of limitations is rigidly fixed on the date of withdrawal, the trustees could risk losing all installments falling due six years after that date for any number of reasons; for example, if an employer initially makes its scheduled payments but then stops, knowing that the statute of limitations has run on the plan's claim for the balance and that it is also too late to declare a default and collect the accelerated debt.

In contrast to the Ninth Circuit, the Seventh Circuit has ruled that the limitations period begins to run from the date of the first missed payment demanded by the plan sponsor. However, the Seventh Circuit, like the Ninth Circuit, failed to give proper weight to the fact that MPPAA permits employers to make installment payments for up to 20 years and also gives the trustees total discretion whether or not to declare a default and accelerate the debt as a result of the employer's failure to make a scheduled installment payment, at least in the absence of administrative review or following an arbitrator's award. Although various provisions of MPPAA contemplate two distinct causes of action, one to collect missed installment payments and one to collect the accelerated debt (upon notice of default), the court found that pension plans can assert only *one* claim against withdrawn employers; namely, for the *full* amount of withdrawal liability. The court reasoned that even if a plan may permit an employer to amortize the debt over as long as 20 years, the entire debt is presumptively due at the outset. Thus, the trustees' cause of action arises only once—on the date the first installment payment is missed. Consequently, a fund has only six years from that date in which to file an action to collect unpaid installments or to accelerate the debt and collect the entire amount due. Although the Seventh Circuit's approach differs from the Ninth Circuit's in that the triggering date is different, both decisions suffer from the same defect because they render MPPAA's "20-year in

stallment payment cap" meaningless and eliminate the trustees' discretion whether and when to declare a default and accerelate the debt.

A third (and much sounder) approach has been taken by the Courts of Appeals for the District of Columbia and the Third Circuits, in recognition that Congress made a reasoned determination that plans would be most likely to collect a withdrawal liability debt if employers had sufficient time to pay it; and that practical and legal constraints exist with respect to the ability of trustees to declare a default and to accelerate the debt.[6] Under both courts' approach, a plan's claim accrues only when an employer fails to meet a demand for payment to which the plan is entitled. Accordingly, a cause of action would accrue each time an employer failed to make a scheduled installment payment and the trustees would also have six years from each such date to collect the amount due. Under that rationale, the trustees would also have six years from the date the accelerated payment was due (following a notice of default) to file a collection action for the accelerated debt.[7] The NCCMP specifically endorsed this approach in *Kahle Engineering, supra*, and continues to believe that the rulings of the District of

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[6] According to a Pension Benefit Guarantee Corporation ("PBGC") Regulation, 29 C.F.R. § 2644.2(c)(1), which has been consistently followed by most plans and accepted by almost all federal courts to date, plans may not declare a default and accelerate a debt pending administrative review and arbitration. This is, indeed, one basis upon which the PBGC as well as numerous plans have argued that the "pay now, dispute later" structure of MPPAA is not unconstitutional. *United Retail & Wholesale Emp's Teamsters Local 115 Pension Plan v. Yahn & McDonnell*, 787 F.2d 128 (3d Cir. 1986), *aff'd by an equally divided Court*, 481 U.S. 735 (1987).

[7] Under this approach, only unpaid installments falling due more than six years prior to the filing of a complaint would be uncollectible. Moreover, the trustees—at any point in the payment schedule—could accelerate the debt and collect all future payments as well as any past installments falling due within the 6-year period prior to filing a complaint to collect the entire debt.

Columbia and Third Circuits reflect a correct reading of the statute.

Congress clearly intended that actions to collect withdrawal liability under Title IV of the statute should be subject to a uniform limitations period. The NCCMP is concerned that without this Court's review of the Ninth Circuit's opinion, further misreadings of the statute will occur, and hence, further divisions of opinion. More specifically, the NCCMP is concerned that if either the Ninth or the Seventh Circuit's approach is adopted by those courts of appeals which have not yet addressed the statute of limitations issue, or by district courts in the absence of binding appellate precedent, the statutory scheme for collecting withdrawal liability will be substantially undermined, and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to reenter the plan under the statute's abatement rules will be substantially impeded unless they retain the statutory discretion *not* to declare a default and accelerate the debt, as acceleration could precipitate the employer into insolvency or would require the employer to pay so large an amount of "past due" withdrawal liability that there would be no incentive to re-enter the plan.

Since all of these results are inimical to the financial health of multiemployer plans, the NCCMP respectfully urges the Court to grant the Petition for *Certiorari* for reasons set forth in greater detail below.

SUMMARY OF REASONS FOR GRANTING PETITION

1. The Ninth Circuit's approach that MPPAA's 6-year statute of limitations begins to run against the trustees on the date of an employer's withdrawal is inconsistent with decisions of this Court and three courts of appeals. It is also premised on a misconstruction of the statutory harm which gives rise to an action to collect withdrawal liability payments. Although a plan is harmed in an abstract sense when an employer withdraws, because any withdrawal diminishes the plan's contribution base, withdrawal liability payments are intended to make plans whole for the

loss of future contributions. Therefore, a plan cannot be harmed by an employer's "act or omission" under MPPAA's civil enforcement provision unless the plan first determines that a *withdrawal* results in *liability* and the employer fails to pay it.

Significantly, an employer can withdraw but incur no liability as a result of MPPAA's *de minimis* rule, or because of statutory exemptions, or because of the application of controlled group principles. Moreover, this Court has ruled that a withdrawing employer owes nothing until a plan first demands a payment, while the District of Columbia, Third, and Seventh Circuits—either expressly or by inference—regard the date of withdrawal as being irrelevant with respect to the accrual of the trustees' claim for withdrawal liability. However, as the courts of appeals differ among themselves as to when trustees' claims do arise, this Court's review is necessary to provide a uniform construction to a critical statutory provision, and therefore to prevent other appellate or district courts from selecting an approach that substantially curtails the trustees' enforcement rights in derogation of Congress's intent.

2. In establishing the date of withdrawal as the date on which the trustees' cause of action to collect withdrawal liability accrues, the Ninth Circuit failed to understand the realities in which multiemployer plans operate. Sections 1383 and 1385 of MPPAA set forth the criteria for complete and partial withdrawals, while various other provisions describe events that are not treated as withdrawals as long as certain statutory requirements are met. In addition, plans may disregard transactions designed primarily to evade or avoid withdrawal liability. However, it is well established that the information necessary to ascertain whether a withdrawal has occurred is often time-consuming and difficult for plans to obtain, a problem which is compounded by the requirement that trades or businesses under common control must be treated as a single employer under highly complex and technical rules.

Moreover, even if a plan is able to secure all of the relevant information, the statutory formulae for calculating withdrawal liability and preparing a payment schedule are highly complicated and frequently require the gathering of data that is not necessarily immediately available, a problem which again is compounded by controlled group rules.

Knowing of these difficulties, Congress did not require plans to assess or collect withdrawal liability as of the date of withdrawal; rather, Section 1399(b)(1) requires plan sponsors to notify employers of their withdrawal liability and demand payment "as soon as practicable." If trustees issue a premature notice and demand without sufficient inquiry, they risk an injunction against the assessment as well as sanctions. However, if they undertake the type of careful analysis which Congress intended when it gave the trustees' determinations a presumption of correctness (a presumption upheld by this Court), they risk a significant foreshortening of their enforcement rights. That payment schedules commonly exceed five or six years is evidenced by the fact that MPPAA itself forgives only those installments due after the *first 20 years*.

Moreover, employers could manipulate the limitations period to deprive plans of most of the liability owed; for example, by complying with the payment schedule *only* until the 6-year period has expired and then stopping, or by curing any outstanding delinquencies arising within the limitations period so as to preclude acceleration of the debt before the trustees' "single" claim expires. In this respect, the Ninth Circuit's approach shares this problematic result with that of the Seventh Circuit.

In addition, by establishing a single claim for withdrawal liability, the Ninth and Seventh Circuits—in contrast to the District of Columbia and Third Circuits—have failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision. There are numerous reasons why trustees might choose not to ac-

celerate; most importantly, to prevent bankruptcy and to encourage re-entry into the plan.

As the purpose of MPPAA is to ensure that plans collect the money due from withdrawn employers, the Ninth and Seventh Circuits' construction of Section 1451(f)(1) should be rejected in favor of the more flexible approaches of the District of Columbia and Third Circuits, which accommodate the needs of multiemployer plans while not imposing undue prejudice on withdrawn employers.

REASONS FOR GRANTING PETITION

I. THE NINTH CIRCUIT'S DECISION IS INCONSISTENT WITH RULINGS OF THIS COURT AND THREE COURTS OF APPEALS

In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo, supra*, the Court of Appeals for the Ninth Circuit ruled that for actions to recover withdrawal liability arising from a complete withdrawal under Section 1383(b), applicable to the construction industry, the 6-year limitations period begins to run when the conditions for withdrawal under that section are met; *i.e.*, the employer's obligation to contribute to the plan has ceased *and* the employer has resumed previously covered work within a 5-year period thereafter without also resuming the obligation to contribute. The court reasoned that the mere cessation of the obligation to contribute under the above provision would not, in and of itself, permit the trustees to assess or receive any withdrawal liability payments or permit them to sue, as a withdrawal would not occur unless covered operations were, in fact, resumed. The court stressed that it would be "anomalous" for a limitations period on a cause of action to run against trustees before they had a "right to sue."

The court limited its holding to withdrawals defined in Section 1383(b). However, it expressly rejected the view previously advanced by the District of Columbia Circuit that the limitations period does not begin to run until a demand for payment goes unmet, observing that this would place the limitations period in the control of the

trustees and could permit lawsuits to be filed years after a withdrawal. Without any further analysis or discussion of text or policy, the *Ferbar* panel in the case at bar concluded that *Thibodo* was dispositive for all complete withdrawals, thereby consolidating the Ninth Circuit's position that a plan's cause of action to recover withdrawal liability accrues as of the date of withdrawal. There is no reason to believe that this holding does not apply both to complete and partial withdrawals under the statute.

Underlying the Ninth Circuit's approach is the apparent belief that the "act or omission" by which a multiemployer plan is harmed is the employer's act of withdrawal. However, although plans may be harmed in an abstract sense when any employer withdraws, as the plan's contribution base is thereby necessarily diminished, *statutory* harm giving rise to a cause of action to collect withdrawal liability payments cannot occur before the trustees have determined that an employer's *withdrawal* has actually resulted in *liability* and the employer fails to pay it. For example, an employer can withdraw but incur no liability as a result of the statute's *de minimis* rule (Section 1389). Or, an employer can withdraw but incur no liability as the result of one or more of the statutory exemptions; for example, the sale of assets exemption (Section 1384). Or, an employer can withdraw and escape liability because it is the member of a controlled group and the conditions for a partial withdrawal have not been met (Sections 1301(b)(1) and 1385). Thus, as recognized by this Court in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S. Ct. 981, 130 L.Ed.2d 932 (1995), "the withdrawing employer owes nothing until its plan demands payment . . . ." Conversely, as withdrawal liability payments are statutorily designed to make the plan whole for the loss of future contributions necessary to fund vested retirement benefits, the plan does not suffer statutory harm unless and until the employer fails to pay them.

For these and other reasons, the Courts of Appeals for the District of Columbia, Third, and Seventh Circuits have

expressly or by inference rejected the notion that a plan's cause of action accrues on the date of withdrawal, ruling, instead, that the limitations period begins to run from the date an employer fails to make a payment demanded by the plan. However, these courts differ among themselves, as noted above.

In *Joyce v. Clyde Sandoz Masonry, supra*, the Court of Appeals for the District of Columbia Circuit, the first appellate court to issue a ruling construing Section 1451(f)(1), concluded—after parsing the statute—that MPPAA contemplates the accrual of two distinct types of claims: a cause of action to collect unpaid installments and a cause of action to collect the accelerated debt (upon notice of default). The court therefore indicated (without expressly holding) that the 6-year limitations period should commence anew with each missed installment payment as well as with a plan's demand for the accelerated debt. The District of Columbia's rationale was subsequently endorsed by the Third Circuit in *Kahle Engineering, supra*, which expressly ruled that a plan has six years from the date a payment is due to collect it.

In contrast, the Court of Appeals for the Seventh Circuit in *Central States v. Navco, supra*, established a single rigid date for commencing the limitations period; namely, the date on which an employer fails to make its first scheduled payment. Viewing the trustees' enforcement rights under a "presumptive acceleration" theory, the court reasoned that the whole amount of withdrawal liability is due at the outset; thus a plan can have only one claim against an employer, which accrues on the date the first payment is missed. Both the Ninth and Seventh Circuits' approaches are incompatible with the structure of MPPAA, an applicable PBGC regulation, and the public policy underlying the statute—which is to reduce plan underfunding and thereby assure that workers will receive their anticipated retirement benefits at the end of their careers.

II. THE NINTH AND SEVENTH CIRCUITS' APPROACHES ARE INCOMPATIBLE WITH THE STRUCTURE OF MPPAA AS WELL AS WITH A GOVERNING PBGC REGULATION AND RAISE SIGNIFICANT PRACTICAL PROBLEMS FOR MULTIEMPLOYER PLANS

In ruling that the statute of limitations commences as of the date of withdrawal, the Ninth Circuit failed to understand the realities in which multiemployer plans operate.

A. Determination and Assessment of Withdrawal Liability

Sections 1383 and 1385 of MPPAA describe the criteria for complete and partial withdrawals. Various other provisions of MPPAA describe events which will not necessarily be deemed to be a complete or partial withdrawal: *e.g.*, a sale of assets, if certain statutory requirements are met (Section 1384); the substitution of one collective bargaining agreement for another (Section 1385(b)(2)(B)); a change in business form, if there is no interruption in contributions (Section 1398(1)); or a labor dispute (Section 1398(2)). In addition, plans may disregard transactions that are designed primarily to evade or avoid withdrawal liability (Section 1392(c)). Information necessary to ascertain the existence of a withdrawal or the existence of a *bona fide* statutory exemption is frequently very difficult and time-consuming for plans to obtain. Yet, if a notice and demand is made prematurely, as the result of an insufficient inquiry, courts may enjoin the assessment and impose sanctions against the plan; *e.g.*, attorney fees.[8]

The difficulty of determining the occurrence of a withdrawal is further compounded by the statutory definition of "employer." For all purposes of withdrawal liability,

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[8] *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 597 F. Supp. 256 (D.D.C 1984) (plan enjoined from enforcing its notice); *T.I.M.E.-DC v. I.A.M. Nat'l Pension Fund*, 616 F. Supp. 400 (D.D.C. 1985) (attorney fees awarded against the plan).

Section 1301(b)(1) of ERISA treats as a "single employer" all trades or businesses under common control as prescribed in regulations applicable to Section 414(b) of the Internal Revenue Code. Although the existence of a controlled group is of critical importance in determining whether a withdrawal has occurred and, if so, whether it is a complete or partial withdrawal, this information is also very difficult for plans to secure, both because the controlled group rules are highly technical and complex and because employers are frequently unwilling or, indeed, unable to provide the information that is most relevant.

Finally, even when a plan is able to secure all of the information described above, the process of preparing a notice and demand takes a significant amount of time, as the statutory formulae for calculating withdrawal liability and preparing a payment schedule are very complicated and may also depend on information that is not immediately available from the plan's actuary or from other sources. In addition, the amount of an employer's withdrawal liability may also depend on its membership within a controlled group.

Knowing of these difficulties, which can be more or less significant in different industries, Congress did not direct trustees to notify employers of their withdrawal and make a demand for payment either immediately following the event or within some fixed time. Rather, Section 1399(b)(1) requires plan sponsors to issue a notice of liability and demand for payment "as soon as practicable after an employer's complete or partial withdrawal," while Section 1399(c)(2) requires employers to begin making the payments demanded no later than 60 days after the date of the demand, notwithstanding administrative challenges to the assessment; *i.e.*, a request for review, appeal of the trustees' determination, and arbitration.

As this Court recognized in *Schlitz*, *supra*, the interval between the date on which an employer effects statutory withdrawal and the date on which a plan sponsor issues a notice and demand for payment can be quite substantial. Under the Ninth Circuit's ruling, however, the time needed to properly investigate the facts and prepare a notice and demand that must be reasonably correct (given the statutory presumptions favoring the determinations of a plan's trustees and actuary)[9] is held against the trustees and curtails their collection rights. Even if a plan is able to act quickly, for example, within a year, trustees will have only five years in which to file a lawsuit for any delinquency that arises and will also need to declare a default within that period or forfeit their right to recover any delinquent payments that may arise on a payment schedule that exceeds five years, although payment schedules exceeding five years' duration are exceedingly common.[10]

Although the Ninth Circuit in *Thibodo* rejected the District of Columbia Circuit's approach because it was loath to allow trustees to "control" the statute of limitations, a perspective that is not only totally inconsistent with plaintiffs' rights generally but with this Court's reasoning in *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), it is actually employers who can manipulate the limitations period so as to deprive plans of most of the liability owed.[11] For example, all an employer would need to do is to substantially comply with the payment schedule for

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[9] *See Concrete Pipe, supra* (MPPAA's statutory presumptions upheld as constitutional).

[10] Although trustees prepare the payment schedule, quarterly or monthly installments are determined in accordance with statutory guidelines described in Section 1399(c). Underlying the statutory design is Congress's intent that an employer's withdrawal liability payments should be roughly equivalent to its annual contribution obligation prior to withdrawal. Hence, an employer's entire withdrawal liability is generally amortized in level payments over a period of many years. That installment payments are likely to extend well beyond the 6-year limitations period is evidenced by Section 1399(c)(1)(B), which limits an employer's liability to the *first 20 years*.

[11] Moreover, the trustees' "control" would not be greater than that of any installment creditor, for example, a mortgage lender.

a period of time which, when combined with the interval between the date of the withdrawal and the date the first payment was due, equals six years. After that time, the employer could stop making installment payments with impunity; as the 6-year limitations period would have run on the trustees' single claim, they could neither collect future installments nor accelerate and collect the remaining debt. A similar result could be achieved by "curing" intermittent delinquencies so as to preclude acceleration during the 6-year limitations period. Although to a somewhat lesser extent, the Seventh Circuit's *Navco* decision could lead to a similar foreshortening of the trustees' statutory enforcement rights.

B. Default and Acceleration

In establishing a single inflexible date for determining the accrual of a plan's cause of action to collect withdrawal liability, the Ninth and Seventh Circuits—in contrast to the District of Columbia and Third Circuits—have failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision.

As noted earlier, under Section 1399(c)(2), withdrawal liability is payable in accordance with the trustees' schedule, beginning no later than 60 days after the date of demand, whether or not the *employer* requests a review of the trustees' determination or initiates arbitration. With regard to the *trustees'* enforcement rights, however, a critical distinction exists, depending on whether or not the employer has sought review and initiated arbitration.

If the employer fails to request a review or fails to initiate arbitration, it waives the right to contest the assessment, and the amounts demanded by the trustees are due and owing as set forth in the trustees' payment schedule. Consequently, if these payments are not made, the trustees may file suit to collect the delinquent installments in accordance with Section 1401(b)(1). In addition, the trustees may declare the employer in default and accelerate the debt under Section 1399(c)(5).

For purposes of Section 1399(c)(5), the term "default" means the failure to make a payment when due if that failure is not cured within 60 days of the date on which the employer received written notification of the failure. Significantly, MPPAA's "default" provision is not self-executing. Rather, to put an employer in default, the trustees must first notify the employer of its failure to have made a required payment and then permit the employer 60 days in which to effect a cure. Moreover, Section 1399(c)(5) does not *require* the trustees to accelerate the debt on default; this is entirely a matter of trustee *discretion* and, as will be discussed below, it may well be in the best interest of the plan not to declare a default.

In contrast to the above, if the employer has requested a review and initiated arbitration, the trustees—under an operative PBGC regulation—have *no discretion* whether or not to declare a withdrawn employer in default and accelerate the debt during the period the employer has for contesting the withdrawal liability assessment. Rather, 29 C.F.R. § 2644.2(c)(1) provides that a default cannot occur earlier than 61 days after the employer's time to contest the withdrawal liability assessment has expired. If an employer misses any payment prior to the occurrence of the last possible event; i.e., the arbitrator's decision, the trustees may assess interest on that payment, and seek to collect the missing payment by filing a collection action. However, the debt cannot be accelerated and the trustees cannot bring an action to collect the entire amount due.

Moreover, even when the trustees' payment schedule becomes final, the trustees have complete discretion not to accelerate the debt but to pursue only the installments set forth in that schedule. Significantly, Section 1399(c)(5) states only that "in the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability . . . ." (Emphasis added.) The discretionary nature of MPPAA's default provision is further confined by PBGC regulation 29 C.F.R. § 2644.2(b)(2), which states that, upon

default, the trustees are free to accelerate (if they so desire) only a portion of the withdrawal liability.

Under the Ninth and Seventh Circuit's rulings, however, the trustees would have no discretion whether or not to declare a default and accelerate the debt; this would have to be done within the fixed 6-year period because (unlike the District of Columbia and Third Circuits, whose approach permits trustees to pursue separate and distinct claims for installment payments and the accelerated debt) neither the Ninth nor the Seventh Circuit recognizes more than a single claim for withdrawal liability. However, this loss of discretion raises significant problems for multiemployer plans.

Of particular concern to the NCCMP is the implication that trustees have a fiduciary duty to accelerate an employer's withdrawal liability debt either as soon as the first payment is missed (under the Seventh Circuit's theory of presumptive acceleration) or no later than six years of the date of withdrawal (Ninth Circuit).

On the one hand, such a fiduciary duty could place the trustees in the anomalous position of being required to accelerate the debt without having the ability to enforce a demand for full payment in the event the employer has requested review and initiated arbitration. On the other hand, even if the trustees are given six years from the date of the first missed payment to accelerate the debt and initiate a lawsuit, a fiduciary duty to accelerate would eliminate the trustees' discretion not to declare a default and accelerate the debt if, at that point in time, the trustees determined that acceleration would not be in the best interest of the fund and its participants and beneficiaries.

A number of reasons exist why trustees might determine that it would *not* be in the fund's best interests to accelerate withdrawal liability and sue for the full amount, at least before such time as the prospect of receiving installment payments becomes substantially unlikely. First, an employer having financial difficulties may attempt to comply with the trustees' payment schedule, but may make its

installment payments late and also at sporadic intervals. In such circumstances, acceleration of the debt and a demand for full payment would likely prompt the employer to seek protection under the Bankruptcy Code. The trustees might therefore determine that it would be more prudent to pursue the monthly installments rather than the accelerated amount, in the expectation of achieving a larger total recovery. Although the employer's financial situation and payment practices might ultimately prompt the trustees to determine that it would be best to accelerate the debt, the desirability of exercising this option might not become apparent within six years of the date of withdrawal or the first missed installment. Under *Ferbar* and *Navco*, however, the trustees would have to accelerate the debt and sue for the full amount of withdrawal liability within those periods or forever lose the right to recover.

Additionally, Section 1399(c)(5)(B) allows plans to adopt rules permitting the trustees to accelerate a withdrawal liability debt where events other than nonpayment indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability. Events such as the employer's insolvency, dissolution, and the commencement of voluntary or involuntary bankruptcy proceedings could trigger a default under this section; however, these events, too, might not occur within six years of the date of withdrawal or of a missed installment payment. Again, under *Ferbar* and *Navco*, trustees could lose their right to accelerate and collect the balance of the withdrawal liability debt if the 6-year limitations period is rigidly linked to the date of withdrawal or the date a first installment payment is missed.

Further, a rigid, single 6-year limitations period could deprive trustees of flexibility in dealing with withdrawn employers who may be considering re-entering the plan for a variety of reasons, including the fact that their liability under MPPAA's re-entry and abatement rules may

be less than the total withdrawal liability assessment. Acceleration of the withdrawal liability debt and the filing of a collection action could chill the employer's business efforts as well as negotiations between the bargaining parties. More importantly, acceleration could remove an important incentive for re-entry as the employer could be required to pay the entire accelerated debt, rather than a lower amount of unpaid installments, as a condition precedent for reacceptance into the plan.

Finally, as noted earlier, an employer could manipulate an inflexible limitations period by curing intermittent delinquencies or by making payments on schedule until the limitations period expires, and then stop, leaving a plan without the ability to collect the balance of the debt.

In sum, there is no basis for the notion that trustees have a statutory and fiduciary obligation to accelerate and collect withdrawal liability within six years either of the date of withdrawal or of the date of a first missed payment, and acceleration of the debt in accordance with such a rule could well result in a loss to the fund. As the District of Columbia Circuit noted in *Joyce*, *supra*, a foreshortening of the trustees' rights would be inimical to the policies animating MPPAA. For, although "Congress has indicated that promptly collecting outstanding sums is desirable," this "is one aspect of the Act's more general purpose of ensuring that plans *collect the amounts due from employers*, a purpose subsidiary to the Act's overriding purpose of ensuring that plans remain solvent despite employer withdrawals (and thus able to provide pension payments to workers who have earned them)." 871 F.2d at 1126 (emphasis added).

Consistent with the purposes of ERISA as well as the specific structure of MPPAA, the Ninth and Seventh Circuits' construction of Section 1451(f)(1) should be rejected in favor of the sounder and more flexible construction offered by the District of Columbia and Third Circuits to assure that the federal courts do not impermissibly

intrude upon the trustees' discretion and erroneously prejudice a plan's collection rights. As the Third and District of Columbia Circuits as well as Petitioner have indicated, sufficient incentives exist to encourage plans to act with reasonable diligence. Moreover, employers who feel prejudiced by delay can raise their timeliness objections in arbitration and can arguably also assert a laches defense in federal court. The NCCMP therefore strongly supports Petitioner's request for review so that MPPAA's statute of limitations provision can be fully considered and clarified to permit trustees a meaningful remedy under the statute.

CONCLUSION

The fundamental purpose of MPPAA was to establish a mechanism by which employers who withdraw from multiemployer plans continue to pay their fair share of the plans' liability for unfunded vested benefits. However, although employers have the option of paying an assessment in a lump sum, Congress contemplated the amortization of withdrawal liability debts over a long period of time, though not to exceed 20 years. By misconstruing MPPAA's statute of limitations provision, the Ninth Circuit impermissibly curtailed the trustees' collection rights so that the "20-year payment cap" is effectively reduced to less than six years. The Seventh Circuit likewise foreshortened the trustees' ability to recover withdrawal liability payments. In contrast, the District of Columbia and Third Circuits have offered a reasonable approach that is fairest to plans without prejudicing employers. As Congress intended that MPPAA's civil enforcement provision be governed by a uniform statute of limitations, and the federal courts are in disagreement as to how the 6-year limitations period should be applied, review is clearly necessary to clarify the statute and to prevent yet further misconstruction. For all of the reasons stated above, the NCCMP respectfully urges the

Court to grant the Petition and to review and reverse the decision below.

Respectfully submitted,

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IN THE
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OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

Central States, Southeast and Southwest Areas Pension Fund moves the Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari of petitioner Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund. Central States urges that the United States Court of Appeals for the Ninth Circuit be reversed. The reasons for ths motion are as follows:

1. Central States Pension Fund is the largest multiemployer defined benefit pension plan in the coun-

try. The Pension Fund covers approximately 400,000 active participants and retirees.

2. Central States is governed by the Employee Retirement Income Security Act of 1974, as amended, including its statute of limitations for collection of withdrawal liability found at 29 U.S.C. § 1451(f).

3. The Central States is located within the jurisdiction of the Seventh Circuit, but does business in and is subject to litigation in each of the numbered federal judicial circuits.

4. The decision of the court below interprets the limitations period of § 1451(f) in a manner in conflict with the interpretation of the Seventh Circuit (and other circuits in which Central States does business).

5. The nationwide scope of Central States' operations makes it uniquely suited to address the effect of the conflict among the circuits on the operations of multiemployer pension plans like Central States and Petitioner.

6. Petitioner consents to the filing of this brief. Respondents refuse to consent.

Respectfully submitted,

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONER

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States") is a multiemployer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters and various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947. Central States is governed by a board of trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the trustees owe an

undivided duty of loyalty. The purpose of the Central States pension plan is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the plan.

Under the plan participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. The plan covers 178,000 retirees currently drawing benefits, 217,000 active participants and 69,000 vested inactive participants.

Central States is the largest multiemployer pension plan in the United States with assets of $14.473 billion and vested benefit liabiliies of $16.524 billion. Central States' unfunded vested benefits ("UVB") are thus $2.051 billion. The UVB is not immediately due because the liabilities represent the present value of benefits payable over decades into the future. The expected time to amortize the UVB at current funding rates is about 29 years. The principal means for funding the UVB, as well as for funding current benefit accruals, is the contributions of employers made pursuant to their collective bargaining agreements. Central States presently receives contributions from over 5,000 employers through over 9,000 billing accounts from 42 states and Canada.[1]

Additional funding is required by statute when an employer withdraws (ceases to have an obligation to contribute) from Central States. 29 U.S.C. § 1381(a). This withdrawal liability is an employer's pro-rata share of the UVB. 29 U.S.C. § 1391. Withdrawal liability is payable in installments with interest. 29 U.S.C. § 1399(c)(1). *See* generally Subtitle E of Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29

[1] A billing account is generally assigned to each collective bargaining agreement. Some employers are subject to more than one agreement.

U.S.C. § 1381, *et seq*; *Milwaukee Brewery Workers v. Jos. Schlitz Brewing Co.*, —— U.S. ——, 115 S.Ct. 994 (1995). As of September 30, 1996, Central States had 305 outstanding assessments of withdrawal liability totalling approximately $267 million. Of these 80 occurred in 1996 in the total amount of $35 million. Since September 26, 1980,[2] Central States has collected about $440 million in withdrawal liability.

Central States' withdrawal liability program, other than its size, is similar to Petitioner's Bay Area Laundry and Dry Cleaning Pension Trust Fund. Due to its size, however, Central States brings a somewhat broader perspective to consideration of certain issues such as that presented in the Petition. Central States files this brief *amicus curiae* in support of Petitioner.

INTERESTS OF CENTRAL STATES

In the decision below the United States Court of Appeals for the Ninth Circuit ruled that the six-year statute of limitations for bringing an action to collect withdrawal liability begins to run on the date that an employer withdraws from a multiemployer pension plan. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corporation, et al.*, 73 F.3d 971 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3185 (U.S. Sept 10, 1996) (No. 96-370). This decision is directly in conflict with four earlier decisions of the United States Courts of Appeals for the First, Third, Seventh, and District of Columbia Circuits in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996); *Board of Trustees of Dist. 15 Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994); *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167

[2] This is the effective date of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), which added the withdrawal liability provisions of ERISA.

(7th Cir. 1993); *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). These other circuits have each ruled that the statute of limitations does not commence running until the latest date on which the cause of action accrues—not when the employer withdraws, but when the employer fails to make a payment pursuant to the pension plan's demand.

This conflict among the circuits creates a problem of immense proportions for multiemployer plans like Central States that cover operations in more than one federal judicial circuit. Which law applies to a withdrawal from Central States? Because of ERISA's broad venue provisions it might be the law of the circuit where the plan is administered or where the employer resides or does business. 29 U.S.C. § 1451(d). While Central States is administered in Rosemont, Illinois, within the Seventh Circuit, only 30% of its billing accounts are in the Seventh Circuit. Central States has actual or potential withdrawal liability claims in 42 states and in each of the eleven numbered judicial circuits. The following table illustrates the breadth of Central States' contributing employer base.

Circuit	Billing Accounts	Percent of Total
1	12	0.1
2	63	0.7
3	170	1.9
4	293	3.2
5	116	1.3
6	2.944	32.1
7	2,781	30.3
8	1,961	21.4
9	228	2.5
10	409	4.5
11	180	2.0
	9,157	100.0%

Nor does the location of the billing account resolve the dilemma on a case by case basis. Many contributing employers conduct operations across state and judicial boundaries. Each of the five largest contributors to Central States does business in virtually every judicial circuit as their number of billing accounts suggest:

Company	Billing Accounts
ABF Freight System, Inc.	132
Consolidated Freightways	173
Roadway Express	182
United Parcel Service (UPS)	101
Yellow Freight Systems, Inc.	150

UPS, for example, does business in every state and has billing accounts in 22 states located in seven federal judicial circuits. Thus, whether an action for collection of withdrawal liability is timely often cannot be known until after commencement of litigation in a particular jurisdiction. Until that time, there will generally be at least two different limitations periods that might be applied.

In sum, the administrative and legal problems created by the conflict among the circuits has, no doubt, an even greater impact on Central States than on Petitioner. Many of the other 2,000 multiemployer pension plans (particularly those located outside the Ninth Circuit) will also experience these problems to one degree or another. Central States, thus, serves as an apt example of why this conflict must be resolved immediately by granting the petition for a writ of certiorari.

ARGUMENT

I. THE STATUTE OF LIMITATIONS FOR BRINGING AN ACTION TO COLLECT WITHDRAWAL LIABILITY HAS BEEN GIVEN CONFLICTING INTERPRETATIONS BY THE FIRST, THIRD, SEVENTH, AND DISTRICT OF COLUMBIA CIRCUITS FROM THAT IN THE COURT BELOW.

Under ERISA a complete withdrawal occurs when a contributing employer permanently ceases to have an obligation to contribute under the plan, or permanently ceases all covered operations under the plan. 29 U.S.C. § 1383(a). The date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations. 29 U.S.C. § 1383(e). Upon the withdrawal of an employer, the plan must notify the employer of the amount of any withdrawal, provide the schedule of payments required of the employer, and collect the withdrawal liability. 29 U.S.C. §§ 1382 and 1399(b)(1). The statute of limitations for bringing an action to collect withdrawal liability is found in 29 U.S.C. § 1451(f):

> (f) An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; . . . .

The court below ruled that "for actions to recover withdrawal liability incurred as a result of a complete withdrawal, . . . the limitations period begins to run from the date that the conditions for withdrawal are met. . . . In other words, the limitations period begins to run from the date of complete withdrawal. . . ." *Bay Area Laundry v. Ferbar Corp.*, 73 F.3d 971, 973 (9th Cir. 1995). The

court's ruling was compelled by its earlier ruling in *Board of Trustees of Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), and was acknowledged to be in conflict with *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). See 73 F.3d at 973 (Trott, J. concurring). While the withdrawal at issue in *Thibodo* arose under a different provision of the statute (29 U.S.C. § 1383(b)), the court saw no ground to distinguish it from the instant withdrawal under 29 U.S.C. § 1383(a). *Id.* The question presented is when does the cause of action arise—the date of withdrawal, as held by the court below, or some later date, as held by the other courts of appeals?

The first of the other courts of appeals to face this question was the District of Columbia Circuit in *Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir. 1989). In that case, the district court had ruled, as did the court below, that the six year limitations period ran from the date of the employer's complete withdrawal. 871 F.2d at 1121. The District of Columbia Circuit reversed. That court looked to 29 U.S.C. § 1451(a), which defines a cause of action in terms of whether a party is "adversely affected by the act or omission of any party . . . with respect to a multiemployer plan." The court held that a plan is adversely affected (and thus, a cause of action arises) when the plan has not received payments which are due and owing. *Id.* at 1122. That can only happen after the date of withdrawal when, having received a demand for payment from the plan, the employer fails to make a scheduled payment when due. Indeed, the court noted that the "language of the statute . . . points firmly in the direction of the conclusion that Sandoz's uncured failure to pay the sum demanded adversely affected the plan, thus giving rise to a cause of action." *Id.*[3]

---

[3] In other words, a simple missed payment under § 1399(c)(1) may not be the latest date on which the statute of limitations begins to run. Under § 1399(c)(5) an employer has 60 days to cure a

The Seventh Circuit next addressed the question in *Central States Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993). There the court held that "the claim accrues as soon as payment becomes overdue." *Id.* at 172. Moreover, the court concluded that "the whole sum becomes due, and the whole claim accrues, when the first payment's missed." *Id.* Thus, where the employer misses a series of payments, the six year statute of limitations runs from the first missed payment, rather than there being a separate limitations period commencing with each missed payment. Since the first missed payment will always be later than the date of withdrawal, the Seventh Circuit decision conflicts with the decision below.[4]

The Third Circuit has also adopted a rule that the statute of limitations runs from the employer's missed payment, not the date of withdrawal. *Machinists Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994). Unlike the *Navco* court, however, the Third Circuit held that absent an acceleration of the withdrawal liability payment schedule by the plan, the six year statute of limitations runs separately against each missed payment. *Id.* at 861. The Third Circuit is thus in conflict with both the court below and the Seventh Circuit. The Third Circuit would apparently agree with the District of Columbia Circuit in *Clyde Sandoz*. *Id.* at 860.[5]

---

missed payment following a notice from the plan. A cause of action for a statutory "default" arises on that latter day from which, we presume, a new limitations period begins to run.

[4] The Seventh Circuit conflicts with the District of Columbia Circuit, as well. The District of Columbia Circuit would count six years from the end of the 60-day cure period of § 1399(c)(5) while the Seventh Circuit would count from the first missed payment notwithstanding the cure period.

[5] It is not clear, however, whether the Third Circuit would agree that if the plan accelerates the amount due, the statute runs from the end of the 60-day cure period of 29 U.S.C. § 1399(c)(5)), as suggested by the District of Columbia Circuit. And no court has addressed whether upon acceleration a new 6-year statute of limitations commences for the entire withdrawal liability amount or whether the amounts due prior to the acceleration have separate limitations periods commencing on their individual due dates with only the balance of the payment schedule subject to the new limitations period.

The First Circuit's decision in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996) also conflicts with the decision below. The First Circuit held that the timeliness of a plan sponsor's demand is governed exclusively by § 1399(b)(1). That provision requires that a plan's demand for withdrawal be made "as soon as practicable" after the employer's withdrawal. In *Giroux*, twelve years had passed after the date of withdrawal before the plan demanded payment. The employer had been making contributions, however, even though its collective bargaining agreement had expired and it was not entitled to contribute. When this error was discovered by the plan, it demanded withdrawal liability. While the court did not have occasion to rule whether this demand was made as soon as practicable, it did make clear that six years from the date of withdrawal would not be an appropriate limitations period. The court below, by contrast, would have ruled the plan's claim barred by the six year statute of limitations of § 1451(f).

In sum, at lease five courts of appeals are in complete disarray on the question presented. There is a clear conflict between the decision below and each of the decisions of the First, Third, Seventh, and District of Columbia Circuits. There is also a clear conflict between the decisions of the Third and Seventh Circuit. Finally, there may be a conflict between the decisions of the District of Columbia Circuit and the Seventh Circuit. This Court should grant the writ of certiorari to resolve these conflicts.

II. THE CONFLICTING DECISIONS OF THE COURTS OF APPEALS PLACE AN UNACCEPTABLE BURDEN ON PENSION PLANS, CONTRIBUTING EMPLOYERS, AND THE COURTS AND SUBVERT STATUTORY PURPOSE.

The conflict in the Circuits places multiemployer plans like Petitioner and Central States in an untenable position. The following example will illustrate:

> Assume that an employer withdraws on June 1, 1986; the plan demands payment in monthly installments over a 20-year payment schedule with the first payment due on September 1, 1986; the employer misses the first payment, but thereafter makes timely monthly payments through September 1, 1992, when it ceases all further payments; the plan sends a notice of default and acceleration on October 1, 1992; the plan sues for collection on December 1, 1992.

Under the Ninth Circuit's interpretation, the statute of limitations would begin to run on June 1, 1986, when the employer withdrew. Thus, the limitations period would expire on June 1, 1992, six years later, and the plan's December 1, 1992 action would be untimely. Of course, the plan could have sued immediately on the first missed payment and under our example, that action would be timely. But, then, what if the employer made every payment when due through the sixth anniversary date of the withdrawal, and then ceased paying?[6] Or what if a labor dispute continued for six years after contributions

[6] The court suggests at note 4 that an employer might form a contract for installment payments resulting in a different limitations period. Actually installment payments are required by the statute and entail no contract. The only choice by the employer is whether to pre-pay the installment as it is entitled to do under 29 U.S.C. § 1399(c)(4). The court was on the right track, however, and if it had stayed there, it would have reached the Third Circuit's view that the statutory payment schedule be treated like an installment contract with a separate limitations period for each missed payment.

ceased?[7] In either case the plan may not sue (and in the latter case it is barred from even issuing an assessment) until after the sixth anniversary of the withdrawal, and thus the plan would be out of time to sue.

Under the Seventh Circuit's interpretation, the statute of limitations would begin to run on September 1, 1986, when the employer first missed a payment. Thus, the limitations period would expire on September 1, 1992, six years later, and the plan's action would be untimely. Under the Seventh Circuit's view, the plan forgives a missed payment at its peril. If the plan does not sue on that first missed payment, the employer would be entitled to cease further payments on the sixth anniversary of its first missed payment.

Under the Third Circuit's interpretation, the statute of limitations would begin to run on September 1, 1986, only for that missed payment, and would expire on September 1, 1992, only as to that payment. A separate limitations period would begin to run when the liability is accelerated —either October 1, 1992, when the notice is issued, or maybe on November 30, 1992, which is the last day of the 60-day period allowed the employer to cure the default. The plan's action would be untimely as to the first missed payment since the limitation period for that one expired on September 1, 1992. The action would be timely for the balance of the withdrawal liability since that limitation period would not expire until October 1, 1998.[8]

[7] Under § 1398(2) a withdrawal does not occur while contributions are suspended during a labor dispute. If, as is often the case, a suspension is later deemed permanent, the withdrawal date relates back to the cessation of contributions (§ 1383(e)), which may be more than six years ago.

[8] The Third Circuit's decision is susceptible to other interpretations. When the plan accelerates the claim, does that new date supplant the original date entirely thus reviving the plan's claim for the first missed payment? (This would conform to the District of Columbia Circuit's view.) Or does it collapse the limitations

Under the District of Columbia Circuit's interpretation, the statute of limitations would begin to run on November 30, 1992, which is the last day of the 60-day cure period following the plan's default notice. The plan's action the next day would be timely for the entire withdrawal assessment because the limitations period on the entire claim would not expire until November 30, 1998.

As this example shows, a plan cannot be sure when its claim for withdrawal liability against a withdrawn employer will become barred by the statute of limitations—at least until litigation is initiated in a court with a particular rule. Nor is it enough for a plan to simply count time from the earliest possible date, the date of withdrawal, as required by the court below. As we have shown, that solution will not work in many cases and would be susceptible to manipulation by withdrawn employers. The decision below is clearly wrong but that does not fully resolve the question. Does the statute run from the first missed payment (Seventh Circuit), the end of the 60-day cure period following a notice of default (District of Columbia Circuit), or from each missed payment when the plan does not exercise its default option (Third Circuit). Uniform (and effective) administration of the statute requires resolution of these conflicts as early as possible. This Court should grant the petition for a writ of certiorari.

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periods on all installments to the original missed payment making the entire claim untimely under this example? (This would conform to the Seventh Circuit's view.)

CONCLUSION

For these reasons the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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No. 96-370

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,
v.
FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AND THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

On November 18, 1996, this Court granted the National Coordinating Committee for Multiemployer Plans' (the "NCCMP") Motion for Leave to file an *amicus* brief in support of the Petition for Certiorari in this case. A separate Motion filed by the Central States, Southeast and Southwest Areas Pension Fund ("Central States") was also granted. Respondents have refused consent to the above *amici's* continued participation in this appeal. Therefore, pursuant to Rule 37 of the Rules of this Court, the NCCMP and Central States respectfully move this Court for leave to file the accompanying joint *amicus* brief, in which we urge the Court to reverse the decision below. Letters granting and refusing consent have been filed with the Clerk of the Court.

INTEREST OF THE NCCMP AND CENTRAL STATES

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans. Currently, more than 240 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP. These affiliated plans represent a majority of participants in multiemployer plans throughout the nation and are representative of the multiemployer plan community generally.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. For this reason, the NCCMP frequently participates as an *amicus curiae* in this Court as well as in the various courts of appeals. With regard to withdrawal liability assessments under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), the NCCMP has represented the interests of multiemployer plans in *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993); *Connolly v. PBGC*, 475 U.S. 211 (1986); and *PMGC v. R. A. Gray & Co.*, 467 U.S. 717 (1984). The NCCMP also filed an *amicus* brief in *Board of Trustees of the Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852 (3d Cir. 1994), which addressed the precise issue at bar. In addition, the NCCMP has been recognized as having had a "significant impact" on MPPAA by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed. July 24, 1980); 126 Cong. Reg. S10,100 (daily ed. July 29, 1980).

The Central States Pension Fund is the largest multiemployer defined benefit pension fund in the United States with assets of $14.473 billion. The plan covers 178,000 retirees currently drawing benefits, 217,000 active participants, and 69,000 vested inactive participants. At present, the Fund receives contributions from over 5,000 employers through over 9,000 billing accounts in 42 states and Canada. As of September 30, 1986, Central States had 305 outstanding assessments of withdrawal liability totalling approximately $267 million. Of these, 80 occurred in 1996 in the amount of $35 million. Since September 26, 1980, the effective date of MPPAA, the Fund has collected about $400 million in withdrawal liability. However, its vigorous collection efforts, which have been heretofore successful, have been recently undermined by the decision of the Ninth Circuit at bar and by the somewhat earlier decision of the Seventh Circuit, which conflicts both with that of the Ninth Circuit and with the sounder decisions of the District of Columbia and Third Circuits, *infra*.[1]

Due to its size, and long experience in enforcing MPPAA on behalf of the Fund's participants and beneficiaries, Central States, like the NCCMP, is able to bring a broad perspective to the issues raised in this case, in

[1] Central States has vested benefit liabilities of $16.524 billion, $2.051 billion in excess of its assets. The Fund's liability for unfunded vested benefits ("UVBs") is not immediately due because the liabilities represent the present value of benefits payable over decades into the future. The expected time to amortize the UVBs at current funding rates is about 29 years. The principal means for funding the UVBs, as well as current benefit accruals, is the contributions made by the employers pursuant to their collective bargaining agreements. However, substantial additional funding, as contemplated by Congress, comes from the Trustees' systematic and rigorous enforcement of MPPAA. The Ninth and Seventh Circuits' approaches have impermissibly curtailed the Trustees' ability to collect withdrawal liability; hence, resolution of the issues raised in this appeal are of critical importance to the Central States Pension Fund.

particular, with respect to the practical problems for national multiemployer plans generated by the present conflict among the circuits as well as the inherent difficulties of enforcing MPPAA within the time constraints imposed by the Courts of Appeals for the Ninth and Seventh Circuits.

For the reasons set forth in the accompanying brief, the NCCMP and Central States respectfully request this Court to clarify as fully as possible consistent with the facts of the conflicting decisions the operation of the 6-year statute of limitations applicable to actions to collect withdrawal liability.

Congress chose not to include a statute of limitations provision applicable to actions to collect delinquent contributions under Title I of ERISA. However, Congress did intend that a uniform 6-year limitations period would govern actions to collect withdrawal liability under Title IV of the statute. However, in spite of the text of Section 1451(a) and (f) of MPPAA's civil enforcement provision, this has not occurred, and there is substantial disarray and confusion among the courts. Moreover, in contrast to the Courts of Appeals for the District of Columbia and Third Circuits, both the Ninth and Seventh Circuits have construed MPPAA's limitations provision in a manner that is inconsistent with other specific provisions of the statute as well as with the structure and design of the statute as a whole. As a result, the time for bringing a collection action in those two jurisdictions has been impermissibly foreshortened, as has been the time within which trustees may exercise their statutory discretion whether or not to accelerate payment and demand the entire amount due.

The NCCMP and Central States are concerned that unless the Ninth and Seventh Circuits' approaches are rejected by this Court, in favor of the more flexible and reasonable approach taken by the Courts of Appeals for the District of Columbia and Third Circuits, MPPAA's statutory scheme for collecting withdrawal liability will be substantially undermined and the effectiveness of MPPAA reduced. In addition, the trustees' ability to encourage withdrawn employers to re-enter the plan under MPPAA's abatement rules will be substantially impeded unless they retain the statutory discretion not to declare a default and accelerate the debt within six years of the date of withdrawal (under the Ninth Circuit's reasoning) or within six years from the date the first installment payment was due and not paid (under the Seventh Circuit's presumptive acceleration approach).

Since the above results are inimical to the financial health of multiemployer pension plans, the NCCMP, on behalf of all affiliated pension plans, and the Central States Pension Fund, on behalf of its participants and beneficiaries, request leave to file a joint *amicus* brief on the merits in support of Petitioner.

In analyzing the conflicting circuit court opinions, *amici* will focus their discussion on why—for quite practical reasons—the single accrual dates selected, respectively, by the Ninth and Seventh Circuits, are unworkable and are likely to result either in a loss of plan assets or in the general 6-year limitations rule (Section 1451(f)(1)) being swallowed up by the discovery rule (Section 1451 (f)(2)), which will lead to inconsistency and skew the legislative balance between enforcement and repose which Congress intended.

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July 16, 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-370

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Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS AND THE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The National Coordinating Committee for Multiemployer Plans ("NCCMP"), joined by the Central States, Southeast and Southwest Areas Pension Fund ("Central States"), submits this *amicus* brief to urge the Court to reverse the decision of the Court of Appeals for the Ninth Circuit, in which the court ruled that the 6-year limitations period governing trustee actions to collect withdrawal liability begins to run from the date on which an employer withdraws from a multiemployer pension fund. Since a uniform limitations rule is of vital importance for multiemployer plans, many of which are large national plans having contributing employers and partici-

pants in many states,[1] we further urge the Court to resolve the conflict that presently exists among the other circuits by affirming the approach taken by the Courts of Appeals for the District of Columbia[2] and Third Circuits[3] and by rejecting the rationale adopted by the Court of Appeals for the Seventh Circuit.[4]

The NCCMP and Central States file this brief because we believe that the decision below as well as the Seventh Circuit's *Navco* decision are inconsistent with the purpose and text of the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461 ("MPPAA"),[5] and that those decisions, unless repudiated by this Court, will seriously impede the ability of multiemployer plan trustees to recover withdrawal liability, as Congress intended. Additionally, we are concerned that unless the rulings of those courts are rejected, trustees will be hindered in exercising their congressionally authorized discretion to work with collective bargaining parties to bring about the re-entry of withdrawn employers into the

---

[1] Central States has actual or potential withdrawal liability claims in 42 states and in each of the 11 numbered judicial circuits. In addition, each of the five largest contributing employers does business in virtually every judicial circuit. The conflict among the circuits raises a serious problem for multiemployer plans which, like Central States, cover operations in more than one federal judicial circuit. For example, which law would apply to a withdrawal from Central States? Because of MPPAA's broad venue provision (29 U.S.C. § 1451(d)), it could be the law where the plan is administered or where the employer resides or does business.

[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989).

[3] *Board of Trustees of the Dist. No. 15 Machinists' Pension Fund v. Kahle Eng'g Corp.*, 43 F.3d 852 (3d Cir. 1994).

[4] *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

[5] Pub. L. 96-364, 94 Stat. 1208 (1980). All further references to MPPAA will be to Title 29, U.S.C.

plan in the interests of the plan's participants and beneficiaries.

For the reasons to be set forth below, the NCCMP and Central States therefore urge the Court to adopt the installment contract approach suggested by both the District of Columbia and Third Circuits and to rule (1) that trustees have six years from the date of each missed installment payment to file suit to collect that payment unless the trustees have exercised their statutory discretion to accelerate the debt; (2) that withdrawal liability cannot be presumptively or automatically accelerated; (3) that trustees are not required by MPPAA's 6-year limitations period to accelerate the debt within six years of the first missed installment or forever lose their right to collect the remainder of the debt; and (4) that if trustees do opt to accelerate the debt, at any point during the payment schedule, they are entitled to collect the entire amount of unpaid withdrawal liability reduced (at most) by installments which fell due more than six years prior to the date a lawsuit was filed to collect the accelerated debt.

INTEREST OF THE NCCMP AND CENTRAL STATES

The NCCMP and Central States incorporate by reference the statement of interest set forth in the attached Motion.

Section 1451(a) of MPPAA permits a fiduciary who is aggrieved by an "act or omission" with respect to the plan to file an action for legal or equitable relief, or both. Section 1451(f)(1) requires such an action to be brought within six years of the date on which the cause of action arose. The issues to be resolved in this appeal are first, whether the limitations period begins to run when an installment payment is due rather than on the withdrawal date and, second, whether the limitations period runs separately as to each installment unless the remaining payments have been accelerated.

In the case at bar, the Ninth Circuit ruled that MPPAA's 6-year statute of limitations begins to run as of the date of withdrawal, rather than as of the date an employer fails to make a payment demanded by the trustees. This is incorrect because a plan cannot determine—as of the date of withdrawal—whether the employer has *any liability* as a result of the withdrawal and cannot assert a legal claim to payment as of that date.

Moreover, the date of withdrawal is itself an inappropriate triggering date as this date may itself be fraught with uncertainty (and is frequently a principal subject of an employer's request for administrative review and arbitration). As a significant amount of time is likely to elapse before a plan is able to confirm with reasonable certainty that a suspension of contributions is, in fact, coincident with a withdrawal as defined by statute, calculate the resulting liability (if any), prepare a payment schedule, and issue a notice and demand for payment, the Ninth Circuit's ruling results—for practical purposes—in trustees' having far less than six years to collect the scheduled payments or to declare a default and collect the accelerated debt. Additionally, because the statute of limitations is rigidly fixed on the date of withdrawal, the trustees—under the Ninth Circuit's approach—could risk losing all installments falling due six or more years after that date for any number of reasons; for example, if an employer initially makes its scheduled payments but then stops, knowing that the statute of limitations has run on the plan's claim for the balance and that it is also too late to declare a default and collect the accelerated debt.

In contrast to the Ninth Circuit, the Seventh Circuit has ruled that the limitations period begins to run from the date of the first missed payment demanded by the plan sponsor. However, in selecting a single triggering date, the Seventh Circuit, like the Ninth Circuit, failed to give proper weight to the fact that MPPAA requires plans to permit employers to make installment payments for up to 20 years and also gives trustees total discretion

whether or not to declare a default and accelerate the debt as a result of the employer's failure to make a scheduled installment payment. Additionally, both courts have failed to consider that a governing Pension Benefit Guaranty Corporation ("PBGC") regulation prohibits acceleration pending administrative review and arbitration, *infra*.

Although various provisions of MPAA contemplate two distinct types of claim-accrual dates—one to collect missed installments and one to collect the accelerated debt (upon notice of default)—the Seventh Circuit found that pension plans can assert only *one* claim against withdrawn employers; namely, for the *full* amount of withdrawal liability. The court reasoned that even if a plan may permit an employer to amortize the debt over as long as 20 years, the entire debt is presumptively due at the outset. Thus, the trustees' cause of action arises only once—on the date the first installment is missed. Consequently, a fund has only six years from that date in which to file an action to collect unpaid installments or to accelerate the debt and collect the entire amount due. (Alternatively, the decision can be read to mean that a first missed installment automatically accelerates the debt.) Although the Seventh Circuit's approach differs from the Ninth Circuit's in that the triggering date is different, both decisions suffer from the same defect because they render meaningless MPPAA's 20-year installment payment cap; ignore the regulatory restraint on acceleration; and eliminate the trustees' discretion to determine whether and when to declare a default and accelerate the debt following or in the absence of review or arbitration.

A third (and much sounder) approach has been taken by the Courts of Appeals for the District of Columbia and Third Circuits, in recognition that Congress made a reasoned determination that plans would be most likely to collect a withdrawal liability debt if employers had sufficient time to pay it; and that practical and legal constraints exist with respect to the ability of trustees to

declare a default and to accelerate the debt. Under both courts' approach, a plan's claim accrues only when an employer fails to meet a demand for payment to which the plan is entitled. Accordingly, a cause of action would arise each time an employer fails to make a scheduled installment payment and the trustees would also have six years from each such date to collect the amount due. Under that rationale, although not decided, the trustees would also have six years from the date the accelerated payment was due (following a notice of default) in which to file an action for the accelerated debt and thus to collect all future payments as well as all installments falling due within the 6-year period prior to filing the complaint. The NCCMP and Central States endorsed this approach, respectively, in *Kahle* and *Navco, supra,* and continue to believe that the reasoning of the District of Columbia and Third Circuits reflects a correct reading of the statute.

The NCCMP and Central States are concerned that if either the Ninth Circuit's or the Seventh Circuit's approach is adopted, the statutory scheme for collecting withdrawal liability will be substantially undermined and the effectiveness of MPPAA reduced. We therefore urge rejection of both courts' approaches, which are predicated on a single and incorrect claim-accrual date and fail to take into account the practical realities in which multiemployer plans operate.

SUMMARY OF ARGUMENTS

1. The date of withdrawal is of no significance with respect to determining when a cause of action to collect withdrawal liability arises. The "act or omission" by which a multiemployer plan is harmed for purposes of applying the 6-year limitations period to collections is not the "act of withdrawal," as an employer can meet the statutory criteria for withdrawal but incur no liability as a result of MPPAA's *de minimis* rule or a statutory exemption. For this reason, a cause of action to *collect* withdrawal liability cannot occur before the trustees have

determined that an employer's withdrawal has resulted in liability, and the employer fails to pay it. This is structurally reflected in the fact that Section 1383(e) defines the date of a complete withdrawal only for purposes of Part 1 of the statute, whereas MPPAA's civil enforcement provision is located in Part 6.

Second, the Ninth Circuit's "date of withdrawal" approach fails to take into account the practical realities in which multiemployer plans operate, and thereby injects uncertainty into a determination that should be reasonably clear to trustees and employers alike, as they weigh their rights and obligations under MPPAA. As the District of Columbia Circuit recognized, the date of withdrawal would be "unwieldy" as an accrual date because it is often very difficult and time-consuming for trustees to determine whether there has been a *permanent* cessation of the obligation to contribute or of covered operations—not only in the construction industry but in other industries as well. Moreover, by the time the date of withdrawal is ascertained (whether during the pre-assessment phase or, if disputed by an employer, in arbitration), the trustees' claim may well be barred. Although courts could extend the general 6-year limitations period by applying the discovery prong of Section 1451(f)(2), the discovery rule was not intended to govern routine collection actions and could increase—not reduce—litigation issues, as the parties dispute who knew or should have known what and when. Inevitably, such a practice would lead to inconsistent results so that the 6-year limitations period which Congress adopted for collection actions under Title IV of ERISA would cease to reflect the legislative balance between enforcement and repose.

2. In ruling that the 6-year limitations period begins to run on the date of withdrawal, the Ninth Circuit disregarded two specific provisions of MPPAA and underestimated the time a plan actually needs to determine whether a withdrawal has occurred and then to prepare a payment schedule. The difficulty of determining whether

an employer has withdrawn or is entitled to a statutory exemption is compounded by the requirement that trades or businesses under common control must be treated as a single employer under highly complex and technical rules which depend for their efficacy on the *employers'* providing requisite information. Knowing of these difficulties, Congress did not require plans to assess or collect withdrawal liability as of the date of withdrawal. Rather, Section 1399(b)(1) requires plan sponsors to notify employers of their withdrawal "as soon as practicable" after that date, while Section 1399(c)(2) requires payment no later than 60 days *after* the notice and demand. If trustees issue a premature notice and demand without having made a sufficient inquiry, they risk an injunction against the assessment, as well as sanctions. However, if they undertake the type of careful analysis Congress intended when it gave the trustees' determinations a presumption of correctness (a presumption upheld by this Court), they risk a substantial foreshortening of their enforcement rights. That payment schedules commonly exceed six years is evidenced by the fact that MPPAA itself forgives only those installments due after the *first 20 years*.

Moreover, employers could manipulate the limitations period to deprive plans of most of the liability owed. For example, an employer could comply with the payment schedule *only* until the 6-year period has expired and then stop or could cure any outstanding delinquencies arising within the limitations period so as to preclude acceleration of the debt before the trustees' "single" claim expires. These and other problematic results which are generated by a single accrual date (and therefore by both the Ninth and Seventh Circuits' rulings) demonstrate why the installment contract approach taken by the District of Columbia and Third Circuits should be upheld as being more consistent with MPPAA's purpose and design.

3. MPPAA does not contemplate automatic acceleration and trustees do not have a fiduciary duty to declare

a default and accelerate the debt within six years of the first missed installment payment. While employers may prepay the debt, Congress envisioned that most employers would amortize a withdrawal liability assessment by making level payments over time, as evidenced by MPPAA's many references to the trustees' payment "schedule." The Seventh Circuit's view that the entire debt automatically accelerates when the first payment is missed or that the trustees must accelerate and file suit to collect the accelerated debt within six years of the first missed payment is inconsistent with the text of MPPAA and fails to appreciate existing constraints on acceleration during the pendency of review and arbitration. Additionally, the Seventh Circuit has misperceived the discretionary nature of MPPAA's default and acceleration provision. Numerous reasons exist why trustees might choose not to accelerate; most importantly, to prevent bankruptcy and to encourage re-entry into the plan.

MPPAA was designed to ensure that withdrawn employers pay their fair share of the plan's liability for unfunded vested benefits ("UVBs"). By misconstruing Section 1451(f)(1) of the statute, the Ninth and Seventh Circuits have impermissibly foreshortened the trustees' ability to collect withdrawal liability and thereby impeded that goal. The accrual dates selected by those courts should therefore be rejected in favor of the more flexible approach of the District of Columbia and Third Circuits, which have ruled that the limitations period does not begin to run until a plan's demand for payment is unmet.

ARGUMENTS

I. THE DATE OF WITHDRAWAL IS OF NO SIGNIFICANCE WITH RESPECT TO DETERMINING WHEN A CAUSE OF ACTION TO COLLECT WITHDRAWAL LIABILITY ARISES.

Of the five circuits which have considered Section 1451(f)(1), the Ninth Circuit alone has ruled that the 6-year limitations period begins to run against trustees seeking

to recover unpaid withdrawal liability as of the date of withdrawal. This approach is inconsistent with the text of MPPAA, rulings of this Court and other courts, and the purpose of a limitations period.

In *Board of Trustees of the Constr. Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1361 (1995), which the *Ferbar* panel felt bound to follow, the court ruled that for actions to recover withdrawal liability arising from a complete withdrawal from a construction industry plan, the 6-year limitations period begins to run when the conditions for withdrawal under Section 1383(b) are met; *i.e.*, the employer's obligation to contribute to the plan has ceased *and* the employer has resumed previously covered work within a 5-year period without also resuming the obligation to contribute. The dispositive dates in *Thibodo* lead to the conclusion that the date of withdrawal could not have been intended to be the date on which the trustees' claim for unpaid withdrawal liability accrues.

The Collective Bargaining Agreement ("CBA") expired on June 15, 1983; and in early 1984, the trustees sent the company a notice and demand for payment of withdrawal liability. The employer disputed the assessment, claiming that it had not withdrawn because it had not hired any laborers to perform work in the jurisdiction of the plan following the contract's expiration. The trustees withdrew the assessment, warning the company that it would owe withdrawal liability if it resumed hiring laborers without resuming the obligation to contribute. In the Spring of 1985, almost two years after its CBA expired, the company did resume hiring laborers and the plan reinstated the assessment. A collection action was filed on June 29, 1989, six years and five days after expiration of the CBA. However, the district court stayed proceedings pending arbitration over two issues, one of which was the date of withdrawal. Relying on Section 1383(e), which defines the date of a complete withdrawal for Part 1 of Title IV (*e.g.*, 29 U.S.C. §§ 1381-1405, as

distinct from 29 U.S.C. § 1451(f), which is in Part 6),[6] the arbitrator found that the company had withdrawn on June 15, 1983, as that was the "date of the cessation of the obligation to contribute." Following the arbitrator's decision, the trustees moved to enforce the arbitration award; however, the employer *now* asserted that the action, which had been filed *prior* to arbitration, was barred by the 6-year limitations period triggered by the June 15, 1983, withdrawal, as subsequently determined by the arbitrator. The district court agreed with the employer and dismissed the action.[7]

The court of appeals, troubled by this result, reversed, finding that the company did not completely withdraw until the Spring of 1985, because it was only then that the statutory conditions for a withdrawal in the construction industry were met. The court reasoned that it would

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[6] That Congress did not intend the definition of "date of withdrawal," as set forth in Section 1383(e), to be synonymous with the "act or omission" giving rise to a cause of action under Section 1451, is structurally confirmed by the fact that the definition is expressly limited to Part 1 of MPPAA, which does not include the statute's civil enforcement provision.

[7] The district court's approach turns MPPAA's dispute resolution scheme on its head. If an arbitrator disagrees with the trustees' determination of the date of withdrawal, the principal consequence for the plan under Section 1401(d) of the statute is that the payment schedule may have to be recalculated; for example, if the date determined by the arbitrator falls in a different plan year from the one initially determined by the trustees. In addition, adjustments for overpayments or underpayments may be required. If the employer fails to make payments in accordance with the arbitrator's final decision, Section 1401(d) treats the employer as being delinquent within the meaning of Title I of the statute. In *Trustees of the Amalgamated Ins. Fund v. Sheldon Hall Clothing, Inc.*, 862 F.2d 1020 (3d Cir. 1988), *cert. denied*, 490 U.S. 1082 (1989), the Third Circuit ruled that trustees have six years to enforce an arbitration award (and hence to collect all interim payments that came due pending arbitration and became final). The only basis for dismissal under this scheme would be if the court stayed proceedings pending arbitration, the arbitrator ruled that the employer did not withdraw, and the court agreed under the appropriate standard of review.

be improper for the limitations period to begin to run against the trustees before they acquired a cause of action; *i.e.*, before they even had the right to assess or receive withdrawal liability payments. Significantly, the court stated: "It is anomalous to conclude that the limitations period of § 1451(f) was running against the Trustees before they had a right to sue." 34 F.3d at 917.

However, to avoid this anomalous result, while still adopting a "date of withdrawal" approach, the court simply selected as the date of withdrawal for limitations purposes the earliest date on which the trustees would have had a legal basis upon which to calculate, assess, and collect withdrawal liability generated by a complete withdrawal under Section 1383(b), rather than the date on which the employer's obligation to contribute permanently ceased, in effect, extending the statutory definition for purposes of applying the 6-year limitations period to collections. (The court was apparently not persuaded that Congress could have used the term "date of withdrawal" instead of "act or omission" in MPPAA's civil enforcement provision, but did not do so.)

Distinguishing between these dates of withdrawal, the court noted that the date of withdrawal, defined in Section 1383(e), is "useful" (indeed, necessary) for calculating the amount of an employer's withdrawal liability under Section 1391(b), as the employer's share of a plan's liability for UVBs is predicated on the UVBs existing on the last day of the plan year preceding the year of withdrawal. However, the court found that this definition was not "useful" for purposes of applying the 6-year limitations period to collections because "selection of such a date may involve a considerable amount of relation back," which—the court correctly understood—could severely curtail the trustees' enforcement rights and cause substantial loss to the plan. 34 F.3d at 917. Nevertheless, the court expressly rejected the clear, straightforward, easy-to-apply approach previously suggested by the District of Columbia Circuit; *i.e.*, that the limitations period does not begin to run until a demand for payment goes unmet. The

court rejected this approach on the grounds that this would place the limitations period in the control of the plaintiff and could result in lawsuits being filed years after withdrawal. In this regard, the court failed to consider, or was not convinced, that ERISA's fiduciary duty considerations, independent from limitations constraints, require trustees to act with reasonable speed in assessing and collecting withdrawal liability, particularly since plans are not entitled to additional interest for a belated notice and demand. Therefore, although the court ruled in favor of the plan in the particular case before it, it did so for the wrong reasons and opened the door to confusion and harmful precedent.

Without any further analysis of text or policy, and without giving any consideration to the concerns that led the *Thibodo* panel to modify the statutory definition of the date of withdrawal for purposes of applying Section 1451(f) to collections, the *Ferbar* panel concluded that *Thibodo* was dispositive for all complete withdrawals; *i.e.*, those defined both in Sections 1383(a) and 1383(b). Indeed, the *Ferbar* panel's failure to consider the concerns sought to be addressed by the *Thibodo* panel suggests that the court would also apply the "date of withdrawal" approach to actions to collect liability generated by partial withdrawals under Section 1385, *infra*, although significant "relation back" problems could also exist here that could curtail or eliminate a fund's enforcement rights or could require another "special" rule.

Underlying the Ninth Circuit's approach is the apparent belief that the "act or omission" by which a multiemployer plan is harmed is the employer's "act of withdrawal." However, although plans may be harmed when any employer withdraws, as the plan's contribution base is thereby necessarily diminished, the specific type of harm giving rise to a cause of action to collect withdrawal liability payments cannot occur before the trustees have determined that an employer's *withdrawal* has actually resulted in *liability* and the employer fails to pay it. Indeed, the fact that MPPAA contains various statutory exemptions

itself indicates that the date of withdrawal can have no significance for a judicial proceeding to *collect* withdrawal liability. For example, an employer can meet the statutory criteria for a withdrawal but incur no liability as a result of MPPAA's *de minimis* rule (Section 1389). Or, an employer can withdraw but incur no liability as the result of the sale of assets exemption (Section 1384) or some other mitigating provision of the statute. Or, an employer can withdraw and escape liability for a complete withdrawal because it is part of a controlled group consisting of one or more employers still making contributions to the fund; such an employer may also escape liability for a partial withdrawal as the specific conditions for a partial withdrawal may not have been met. (29 U.S.C. §§ 1301 (b)(1) and 1385.) Thus, as recognized by this Court in *Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S. Ct. 981, 988 (1995), "the withdrawing employer owes nothing until its plan demands payment. . . ." Conversely, as withdrawal liability payments have been statutorily designed to make the plan whole for the loss of future contributions necessary to fund vested retirement benefits, the plan is not "adversely affected" within the meaning of Section 1451(a) until an employer "omits" to comply with the trustees' demand for payment—whether in accordance with the installment payment schedule required under Sections 1399(b)(1) and (c)(1)(A), (2), and (3), or for the entire amount due—following a notice of default and acceleration under Section 1399(c)(5).

The Ninth Circuit's "date of withdrawal" approach not only fails to take into account the statute as a whole; it also fails to take into account the realities in which multiemployer plans operate and thereby injects uncertainty into a determination that should be clear and simple both for trustees and employers to weigh their rights and obligations under MPPAA.

In rejecting the installment contract approach suggested by the District of Columbia Circuit in *Sandoz* (which was

subsequently expressly endorsed by the Third Circuit in *Kahle*), the *Thibodo* panel stated:

> In deciding that the limitations period does not begin to run until a demand for payment goes unmet, the District of Columbia Circuit was influenced by the difficulty of determining when an employer had "permanently" ceased to have an obligation to contribute or "permanently" ceased all covered operations, within the meaning of § 1383(a) [citation omitted]. Whatever the difficulties might be under that subsection, we conclude that the construction industry provisions of § 1383(b) do not lead to debilitating uncertainty whether an employer has completely withdrawn.

34 F.3d at 917. Contrary to the panel's belief, trustees may not be readily aware that an employer has permanently withdrawn even in the construction industry. A small multiemployer plan in the construction industry, providing benefits to participants in a limited geographical area covered by CBAs with one or a few local unions, might be expected to be able to track—with relative expediency—whether a former contributing employer has resumed covered operations within five years after the last CBA expired. However, given the migratory nature of construction work (and the relatively complex reciprocal contribution arrangements between funds that also exist), monitoring employers even in a small plan can prove difficult. For larger construction industry funds having employers and participants in more than one state, this task could raise insuperable problems if the trustees must determine that a withdrawal has occurred within a fixed period of time rather than "as soon as practicable"—particularly since ERISA imposes a fiduciary duty on fund trustees to keep administrative costs to a reasonable level so that employer contributions can be invested for the primary purpose of providing benefits. 29 U.S.C. § 1104 (a)(1)(A)(i) and (ii).

Moreover, large multiemployer plans other than those in the construction industry would find it time-consuming,

difficult, and very costly to constantly monitor each employer contributing to the plan. For a plan the size of *amicus* Central States, which has over 9,000 accounts in 42 states and Canada, such constant monitoring could amount to a practical impossibility. In this regard, partial withdrawals, as defined in Section 1385 of MPPAA, present particularly great problems. Section 1385(a)(2) states that a partial withdrawal occurs when there is a "partial cessation of the employer's contribution obligation." Under Section 1385(b)(2)(A), this "partial cessation" occurs either (i) where an employer permanently ceases to have an obligation to contribute under one or more but fewer than all of its CBAs but continues to perform work in the jurisdiction of the contract for which contributions were previously required or transfers the work to another location; or (ii) where an employer permanently ceases to have an obligation to contribute with respect to work performed at one or more but fewer than all of its facilities but continues to perform similar work at the facility. Determining whether an employer is continuing to perform work in a particular jurisdiction or at a particular facility can be extremely difficult and time-consuming, as information pertinent to these inquiries is in the hands of the employer, not the pension plan. Even more difficult is a situation where one member of a controlled group of employers, *infra*, may be shifting work between itself and another controlled group member.

Moreover, as the District of Columbia Circuit recognized in *Sandoz*, the date of withdrawal is likely to be an "unwieldy" accrual date for purposes of applying the 6-year limitations period, not only in the construction industry, and not only because of the difficulty of ascertaining whether and when previously covered work has resumed. Indeed, as great, and perhaps even greater uncertainty may exist with regard to the specific date on which the "obligation to contribute" permanently ceased, as the permanent cessation of the obligation to contribute depends not only on the expiration date set forth in a CBA, but on postexpiration events under applicable labor-

management relations law. 29 U.S.C. § 1392. Indeed, it is only in the simplest case that the date of withdrawal coincides with the nominal expiration date of the CBA. Rather, many other facts often require consideration; for example, whether and for what reason the CBA may have renewed (*e.g.*, automatically, by its own terms, or because of a defective termination notice, or as a result of conduct inconsistent with repudiation); if the contract did terminate, whether bargaining continued and whether and when a permanent impasse was reached; or whether a labor dispute existed and how and when the dispute was resolved—information that is not normally within the purview of the trustees and is ordinarily pinned down either during the pre-assessment investigative process or (if an employer disputes either that it has withdrawn or the date of withdrawal) during administrative review and/or arbitration. The uncertainty surrounding the date on which the obligation to contribute permanently ceases (coupled with the fact that, absent some special rule, "relation back" requirements could eliminate the trustees' ability to collect any withdrawal liability even after prevailing in arbitration), clearly makes the date of withdrawal an inappropriate date for commencing the running of MPPAA's 6-year limitations period. This is illustrated in *Giroux Bros. Transp. v. New England Teamsters & Trucking Indus. Pension Fund*, 73 F.3d 1 (1st Cir. 1996).

In *Giroux*, an employer in the trucking industry made pension contributions to a multiemployer fund pursuant to periodic "supplements" which bound the company to an industry-wide CBA. The last contract was executed in 1981 or 1982. However, the company continued to make contributions without interruption until early 1994, and never notified the fund that it no longer had a contract. When Giroux finally stopped making contributions, the fund issued a standard delinquency notice; the employer responded that it had not had a contract for many years. The fund verified that there was no contract after 1981 or 1982, and assessed withdrawal liability based on a September 1981 withdrawal. The employer sought a judi-

cial declaration that the assessment was barred by the 6-year limitations period as well as an injunction prohibiting the fund from collecting interim payments. Affirming the ruling of the district court in favor of the fund, the Court of Appeals for the First Circuit held that the 6-year statute of limitations applies only to litigation and not to the trustees' notice and demand for payment under Section 1399(b)(1), which requires only that the trustees make a demand "as soon as practicable." In this regard, the court emphasized that an employer wishing to challenge the timeliness of the demand must do so in arbitration. Noting Congress's clear intent that employers should "pay now, dispute later" to protect multiemployer pension plans, the court also refused to enjoin interim payments of withdrawal liability, as the employer was unable to show irreparable harm.

Short-form contracts, such as Giroux's, are common not only in the trucking industry; they are also frequently found in the construction industry and often make it difficult to determine the date of withdrawal. For example, employers may sign only a letter of assent agreeing to be bound by a master labor agreement. Such letters of assent may not contain an expiration date and are intended to survive successor master agreements until such time as an express, written notice of termination is given. While such practice may give rise to collection or labor disputes, and while uncertainty over the duration of the contractual obligation may sometimes result in unfair labor practice charges, the absence of a signed letter of assent, memorandum agreement, or similar short-form contract binding an employer to the then-current master agreement does not ordinarily give rise to an inference that the employer has permanently ceased to have an obligation to contribute where it is industry practice to have this form of CBA, as the First Circuit correctly noted with respect to the trucking industry. However, under the "date of withdrawal" approach adopted by the Ninth Circuit, a fund's belated discovery that the absence of one or more updated short-form agreements was intended to signify the end of the

contractual obligation (and thus the employer's withdrawal) would, in many cases, result in the fund's inability to collect any withdrawal liability. This would be particularly offensive where the employer's own deceptive conduct in making contributions induced a reasonable belief that the employer had not withdrawn.

While a court—even in the Ninth Circuit—might be persuaded to apply the discovery rule of Section 1451(f)(2) where an employer misleads a plan into believing that it had not withdrawn,[8] thereby extending the limitations period for basically equitable reasons, the solution offered by the District of Columbia and the Third Circuits would make a case-by-case analysis (with potentially inconsistent results) unnecessary and should be adopted by this Court. Moreover, as the *Sandoz* court clearly recognized, the discovery rule was not intended to govern routine collection actions, as application of the rule would increase—not reduce—litigation issues, as the employer and trustees dispute who knew, or should have known, what and when. However, unless the approach of the District of Columbia and Third Circuits is adopted, so that the 6-year limitations period begins to run in a consistent manner from the date on which a payment demanded by the plan is due, but not paid, the general rule may well be swallowed by the discovery rule with the result that the 6-year general rule could cease to reflect the balance Congress chose between enforcement and repose. For all of the above reasons, the Ninth Circuit's decision should be reversed.

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[8] The general 6-year limitations period can be extended in appropriate circumstances by § 1451(f)(2), which provides that an action may be brought "3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action" or 6 years in the event of fraud or concealment.

II. THE "DATE OF WITHDRAWAL" APPROACH CONFLICTS SPECIFICALLY WITH SECTION 1399(b)(1) OF MPPAA, WHICH REQUIRES TRUSTEES TO ISSUE A NOTICE AND DEMAND "AS SOON AS PRACTICABLE" AFTER A WITHDRAWAL, AND WITH SECTION 1399(c)(2), WHICH REQUIRES PAYMENT NO LATER THAN 60 DAYS *AFTER* THE NOTICE AND DEMAND.

In ruling that the statute of limitations commences as of the date of withdrawal, the Ninth Circuit appears to have disregarded two very specific provisions of MPPAA and underestimated the time a multiemployer plan actually needs to determine whether a withdrawal has in fact occurred and to prepare a payment schedule.

As noted earlier, Sections 1383 and 1385 of MPPAA describe the criteria for complete and partial withdrawals, while other provisions of MPPAA describe events which will not necessarily be deemed to be a withdrawal; *e.g.*, a sale of assets, if certain statutory requirements are met (Section 1384); the substitution of one CBA for another (Section 1385(b)(2)(B)); a change in business form, if there is no interruption in contributions (Section 1398(1)); or a labor dispute (Section 1398(2)). In addition, plans may disregard transactions that are designed primarily to evade or avoid withdrawal liability (Section 1392(c)). As discussed in connection with the specifics of the trucking and construction industries, *supra*, it is often difficult for a plan to determine the *permanent* cessation of the obligation to contribute or the *permanent* cessation of covered operations. It is frequently even more difficult and time-consuming for plans to determine the existence of a *bona fide* statutory exemption, as well as the converse, that what appeared to be a *bona fide* transaction was really a transaction to evade or avoid withdrawal liability, because much of the most relevant information is ordinarily not within the trustees' possession. Moreover, these difficulties are compounded by the statutory definition of "employer."

For all purposes of withdrawal liability, Section 1301(b)(1) of ERISA treats as a "single employer" all trades

and businesses under common control as prescribed in regulations applicable to Section 414(b) of the Internal Revenue Code. The existence of a controlled group is of critical importance in determining whether a withdrawal has occurred and, if so, whether it is a complete or partial withdrawal. However, as many contributing employers are relatively small close corporations, sole proprietorships, or partnerships, and not publicly-traded companies, this information is particularly difficult for trustees to obtain. Many plans—at the pre-assessment stage—send employers questionnaires (sometimes captioned a "statement of business affairs") requesting very specific information concerning the ownership interests of the company and its principals to ascertain the commonality of such interests in related enterprises. All too frequently, these questionnaires are not answered completely or correctly, or are not answered at all, both because the controlled group rules are highly technical and complex and because some employers are unwilling or unable to provide the information that is most relevant. Indeed, many employers are not aware that a variety of the activities in which the company or its owners engage are viewed as "trades or businesses" under applicable law.

Given ERISA's prudence concerns, trustees will be loath to expend fund assets issuing a notice and demand and engaging in administrative review and often costly arbitration prior to investigating a potential withdrawal liability claim with due diligence, as they will wish to be at least reasonably certain that the employer has been correctly identified and that no statutory exemptions exist.[9]

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[9] Even after a plan acquires information leading it to conduct further investigation, the determination of whether and when a withdrawal occurred can involve complex and difficult fact-finding. An employer who files for bankruptcy liquidation seemingly presents the prototypical example of an "easy" determination of withdrawal. Frequently, however the employer will be using employees, for example, truck drivers, to marshal assets for liquidation. Thus, although the employer may seem to have ceased reporting any obligation to the plan following the bankruptcy, bargaining unit

Moreover, if a notice and demand is made prematurely, as the result of an insufficient inquiry, courts may enjoin the assessment and impose sanctions against the plan; *e.g.*, attorney fees.[10]

Finally, even when a plan is able to secure all of the information described above, the process of preparing a notice and demand takes a significant amount of time, as the statutory formulae for calculating withdrawal liability and preparing a payment schedule are very complex and may also depend on information that is not immediately available from the plan's own records, the plan's actuary, or from other sources.[11]

Knowing of these difficulties, which can be more or less significant in different industries, Congress did not direct trustees to notify employers of their withdrawal and make a demand for payment either immediately following the event or within some fixed time. Rather, Section 1399 (b)(1) requires plan sponsors to issue a notice of liability and demand for payment "as soon as practicable after an employer's complete or partial withdrawal"; correspondingly, Section 1399(c)(2) requires employers to begin making the payments demanded, in accordance with the trustees' payment schedule, no later than 60 days *after* the date of the demand, notwithstanding administrative challenges to the assessment; *e.g.*, a request for review, appeal of the trustees' determination, and arbitration.

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work is still being performed. Accordingly, a complete withdrawal has not occurred.

[10] *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 597 F. Supp. 256 (D.D.C. 1984) (plan enjoined from enforcing notice); *T.I.M.E.-DC, Inc. v. I.A.M. Nat'l Pension Fund*, 616 F. Supp. 400 (D.D.C. 1985) (attorney fees awarded against the plan).

[11] Commonly, actuarial valuations containing the applicable UVBs are not available for at least six months after the end of a plan year. Thus, for example, the UVBs needed to compute the withdrawal liability for an employer that withdrew in January 1997 may not be available until June 1998 or later. Plan audits, which may also affect the calculation, may also not occur until months after the end of a plan year.

As this Court recognized in *Schlitz, supra*, the interval between the date on which an employer effects a statutory withdrawal and the date on which a plan sponsor issues a notice and demand for payment can be quite substantial (without, for that reason, being objectionable). Under the Ninth Circuit's ruling, however, the time needed to properly investigate the facts and prepare a notice and demand that must be reasonably correct (given the statutory presumptions favoring the determinations of the plan's trustees and actuary)[12] is held against the trustees and curtails their collection rights. The Ninth Circuit's approach simply cannot be squared with the fact that Congress contemplated that the primary mode of payment would be in level installments, as determined under Section 1399(c)(1)(A), and that payment schedules exceeding six years' duration are exceedingly common and, in fact, may be cut off only after the end of 20 years. Nor can it be squared with *Schlitz, supra*, in which this Court stated that "the statute . . . might make the withdrawing employer pay (or begin payment) on the date the employer actually withdraws. But it does not do so." 115 S. Ct. at 987.

Finally, although the Ninth Circuit in *Thibodo* rejected the District of Columbia Circuit's installment contract approach because it was loath to allow the trustees to "control" the statute of limitations, under the Ninth Circuit's approach, it is actually employers who can manipulate the limitations period so as to deprive plans of all or most of the liability owed. For example, all the employer would need to do to exhaust the statute of limitations is to substantially comply with the payment schedule for a period of time which, when combined with the interval between the date of withdrawal and the date the first payment was due, equals six years. After that time, the employer could stop making installment payments with impunity; as the 6-year limitations period would have

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[12] *See Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) (MPPAA's statutory presumptions upheld as constitutional).

run on the trustees' single claim, they could collect neither future installments nor accelerate and collect the remaining debt. A similar result could be achieved by "curing" intermittent delinquencies so as to preclude acceleration during the 6-year period available for collection. Although to a somewhat lesser extent, the Seventh Circuit's *Navco* approach could lead to a similar foreshortening of the trustees' statutory enforcement rights, and for that reason should also be rejected, as we will now show.

III. MPPAA DOES NOT CONTEMPLATE AUTOMATIC ACCELERATION AND TRUSTEES SHOULD NOT BE REQUIRED TO ACCELERATE WITHIN SIX YEARS OF THE FIRST MISSED INSTALLMENT.

In *Navco*, the Seventh Circuit ruled that the trustees' single claim for withdrawal liability accrues on the date the first installment payment is missed because the entire amount is presumptively due on that date. Although the opinion is not entirely clear on this point, it can be read to mean that the debt automatically accelerates at this time. However, even if acceleration is not automatic, trustees have only six years from the date of the first missed payment to declare a default, accelerate the debt, and file a lawsuit to collect the entire amount due. In contrast to the District of Columbia and Third Circuits, the Seventh Circuit's presumptive acceleration approach misperceives the essential features of the payment structure Congress selected. Additionally, the court failed to appreciate existing restraints on trustees' enforcement rights as well as the discretionary nature of MPPAA's default and acceleration provision.

As this Court recognized in *Schlitz, supra*, Congress envisioned that employers would amortize the debt in level payments (roughly related to the amount of their former contributions) over time, indeed, for up to 20 years. While employers may repay the assessment and thereby avoid or reduce interest, many (if not most) employers cannot afford to do so. Not surprisingly, Section 1399, "Notice, collection, etc., of withdrawal liability," is replete with references to the trustees' payment *schedule*, with which employers must comply no later than 60 days after the date of the notice and demand, whether or not review is requested. Likewise, Section 1401, "Resolution of disputes," anticipates payment in accordance with the trustees' *schedule*, both pending and after arbitration. With regard to the trustees' enforcement rights, however, a critical distinction exists, depending on whether or not the employer has sought review and initiated arbitration.

If the employer fails to request a review or fails to initiate arbitration, it waives the right to contest the assessment, and the amount demanded by the trustees is due and owing as set forth in the trustees' payment schedule. Consequently, if these payments are not made, the trustees may file suit to collect the delinquent installments in accordance with Section 1401(b)(1). In addition, the trustees may declare the employer in default and accelerate the debt under Section 1399(c)(5)(A).

For purposes of Section 1399(c)(5)(A), the term "default" means the failure to make a payment when due if that failure is not cured within 60 days of the date on which the employer received written notification of the failure. Significantly, MPPAA's default provision is not self-executing. Rather, to put the employer in default, the trustees must first notify the employer of its failure to have made a required payment and then permit the employer 60 days in which to effect a cure.

If the employer has requested review and initiated arbitration, the trustees—under an operative PBGC regulation—have *no discretion* whether or not to declare a default and accelerate the debt during the period the employer has for contesting the assessment.[13] Rather, 29

[13] Most plans and nearly every federal court has followed this regulation. The trustees' inability to declare a default and accelerate during the review period is one basis upon which the PBGC as well as numerous plans have argued that the "pay now, dispute later" structure of MPPAA is not unconstitutional. *See United*

C.F.R. § 4219.31(c)(1) (1996) provides that a default cannot occur earlier than 61 days after the employer's time to contest the assessment has expired. If an employer fails to make one or more "interim payments" prior to the arbitrator's decision, which is the last possible event in the nonjudicial dispute-resolution scheme, the trustees may assess interest on that payment (or on any other missed installments) and file suit to collect the amounts due. However, they are not permitted to accelerate and collect the entire debt at this time. (It may be noted that, depending on particular facts and circumstances, many trustees may make a business judgment not to pursue an action to collect interim payments in federal court during the pendency of arbitration, as they do not wish to undertake the costs of proceeding in two forums at the same time in the absence of a statutory requirement to do so.)

Moreover, even when the trustees' payment schedule has become final, whether in the absence of arbitration or after the arbitrator has issued an award, the trustees have complete discretion to continue to pursue only the installments set forth in the schedule. Significantly, Section 1399(c)(5) states only that "in the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability. . . ." (Emphasis added.) The discretionary nature of MPPAA's default provision is further confirmed by PBGC regulation 29 C.F.R. § 4219.31(b)(2) (1996), which states that upon default, the trustees are free to accelerate (if they so desire) only a portion of the withdrawal liability. Under the Seventh Circuit's ruling, however, the trustees would have no discretion whether or not to declare a default, particularly if the decision is meant to suggest that the debt automatically accelerates when the first

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Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan v. Yahn & McDonnell, Inc., 787 F.2d 128 (3d Cir. 1986), ***aff'd by an equally divided Court***, 481 U.S. 735 (1987). One court has recently invalidated the regulation. ***Central States v. Century Motor Freight***, 1995 WL 699655 (W.D. Ill. Nov. 22, 1995).

installment payment is missed. Moreover, even if acceleration is not automatic and trustees have up to six years from the date of the first missed installment to declare a default and sue to collect the accelerated debt, the loss of discretion not to accelerate raises serious problems for multiemployer plans.

Of particular concern to the NCCMP is the belief implicit in the Ninth and Seventh Circuits' decisions that trustees have a fiduciary duty to accelerate an employer's withdrawal liability debt. On the one hand, such a fiduciary duty could place the trustees in the anomalous position of being required to accelerate the debt without having the ability to enforce a demand for full payment in the event the employer has requested review and initiated arbitration. On the other hand, even if enforcement problems did not exist, a fiduciary duty to accelerate within six years of a first missed payment would interfere with the trustees' ability to make and implement a business judgment that acceleration would not be in the best interests of the plan.

A number of reasons exist why trustees might determine that it would *not* be in the plan's best interest to accelerate and demand payment of the entire debt, at least until such time as the prospect of receiving installment payments becomes substantially unlikely. First, an employer having financial difficulties may attempt to comply with the trustees' payment schedule, but may make its payments late and also at sporadic intervals. In such circumstances, acceleration of the withdrawal liability debt and a demand for full payment would likely prompt the employer to seek protection under the Bankruptcy Code. Depending on the size of withdrawal liability debt and the nature and size of the debts of other creditors, the plan could stand to recover little or nothing on its withdrawal liability claim. Therefore, the trustees might determine that it would be more prudent to try to collect as many installments as possible in anticipation that bankruptcy can be avoided or, at least, postponed until such time as a substantial number of installments have already been collected. Alter-

natively, although an employer's financial situation and payment practices might ultimately prompt trustees to determine that it would be best to accelerate the debt, even at the risk of bankruptcy, the desirability of exercising this option might not become apparent within six years of the first missed installment. Moreover, in this intervening time, the trustees could become aware of the existence of a solvent member of a controlled group which would reduce the risk of nonpayment in bankruptcy.[14] These plan-protective options would be severely restricted under *Navco*.

Additionally, Section 1399(c)(5)(B) allows plans to adopt rules permitting the trustees to accelerate a withdrawal liability debt where events other than nonpayment indicate a substantial likelihood that an employer will be unable to pay its withdrawal liability. Events such as the employer's insolvency, dissolution, or loss of a license to do business could trigger a default under this section; however, these events, too, might not occur within six years of the first missed installment payment. However, by then it would be too late for the plan to act.

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[14] The single accrual date selected by both the Ninth and Seventh Circuits not only eviscerates a fund's ability to protect itself from a default, should one occur due to missed installment payments occurring more than six years after the date of withdrawal or the first missed payment, it also forces a fund to expend substantial resources conducting investigations that are unnecessary at the time the employer is assessed. For example, if a fund assesses the known members of a controlled group, and at least one member of the group begins to pay in a timely manner and has also been reasonably determined to be financially capable of satisfying the entire debt, the fund would ordinarily forego searching for additional controlled group members, which can be quite costly. However, given the statute of limitations constraints imposed by the above courts, funds in those circuits may feel compelled to undertake this costly and difficult search for unknown members of the group at the outset, even though it may never be necessary for the fund to proceed against those persons or entities. Adoption of the installment contract approach would prevent a potential waste of fund assets.

Further, a rigid, single 6-year limitations period could deprive trustees of flexibility in dealing with withdrawn employers who may be considering re-entering the plan for a variety of reasons under MPPAA's re-entry and abatement rules. Acceleration of the debt could chill the employer's business efforts as well as negotiations between the bargaining parties. Indeed, acceleration could remove an important incentive for re-entry. Additionally, negotiations for a new CBA could take a substantial amount of time; in the event negotiations failed, it could well be too late for the trustees to accelerate.

Finally, as noted earlier in connection with the Ninth Circuit's "date of withdrawal" approach, an employer could manipulate an inflexible limitations period by curing intermittent delinquencies, or by making payments on schedule until the limitations period expires, and then stop, leaving a plan without the ability to collect the balance of the debt.

In sum, there is no basis for the notion that MPPAA contemplates automatic acceleration or that trustees have a fiduciary duty to accelerate the debt within six years of the first missed installment payment. As the District of Columbia Circuit indicated in *Sandoz* and the Third Circuit indicated in *Kahle*, a foreshortening of the trustees' collection rights would be inimical to the policies animating MPPAA, particularly as other incentives exist to encourage plans to act with reasonable diligence.

CONCLUSION

The fundamental purpose of MPPAA was to establish a mechanism by which employers withdrawing from multiemployer plans continue to pay their fair share of the plan's liability for UVBs. To effectuate this goal, the District of Columbia and Third Circuits have suggested an installment contract approach that is consistent with the text of MPPAA, easy to apply, and fairest to plans without prejudicing employers. For the reasons stated above, the NCCMP and Central States urge this Court to adopt the approach of these courts and to rule: that trustees have six years from the date of any missed installment payment to collect that payment; that trustees have discretion to accelerate the debt at any point along the payment schedule; and that if the trustees do elect to accelerate, the 6-year limitations period begins to run from the date the accelerated debt is due.

Respectfully submitted,

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BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* ON BEHALF OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF PETITIONER

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Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC. STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Midwest Motor Express, Inc. ("Midwest") moves for leave to file a brief *amicus curiae* in support of Petitioner Board of Trustees, Bay Area Laundry and Dry Cleaning Pension Trust Fund.

The named Petitioners have consented verbally to the filing of a brief *amicus curiae* on behalf of Midwest. Respondent has not consented.

Midwest is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest was inolved in a labor dispute that lasted nearly three years beginning on August 12, 1991, and ending with

the National Labor Relations Board certification that the Midwest employees decertified the union on April 15, 1994. Until that date, Midwest's employees were members of the International Brotherhood of Teamsters ("Teamsters"), and participated in the Central States Southeast and Southwest Areas Pension Fund ("Central States"). Central States assessed withdrawal liability against Midwest later in April 1994. Central States could not have assessed withdrawal liability against Midwest prior to April 15, 1994, because of the labor dispute exception to withdrawal liability. ERISA § 4218(2), 29 U.S.C. § 1398(2).

However, if applied to Midwest's facts, the decision of the Ninth Circuit that the statute of limitations begins to run from the date of complete withdrawal would have deprived Central States of nearly one-half of the six-year statute of limitations for pension funds to sue withdrawing employers. ERISA § 3401(f), 29 U.S.C. § 1451(f). This would have encouraged Central States to assess withdrawal liability against Midwest as soon as possible to protect the fund against the running of the statute. Central States' suit for the collection of withdrawal liability against Midwest while Midwest was fighting a labor strike either would have overwhelmed Midwest or would have forced it to capitulate to the Teamster demands it otherwise resisted in the absence of a lawsuit.

The labor dispute exception is critical for employers engaged in a strike. Its procedure provides an important check and balance against hasty, unilateral action by plan trustees.

The Ninth Circuit's decision in the case at bar conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The resolution of this case has serious implications for the continued viability of the labor dispute exemption to withdrawal liability as well as assuring that ERISA not be interpreted in such a manner as to undermine the collective bargaining process.

This case presents a critical question regarding the accrual of a cause of action under MPPAA. Midwest believes that the decision of the court below, if permitted to stand, will have a significant and substantial negative impact upon the future of multiemployer plans, upon the resolution of future labor disputes and upon future interplay between MPPAA and the collective bargaining process.

Accordingly, *amicus* respectfully moves for leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF MIDWEST MOTOR EXPRESS, INC. IN SUPPORT OF PETITIONER[1]

STATUTORY PROVISION INVOLVED

Section 1398 of Title 29 of the United States Code provides:

> **Withdrawal not to occur merely because of change in business form or suspension of contributions during labor dispute**
>
> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—

---

[1] As required by Supreme Court Rule 37.6, *amicus curiae* Midwest Motor Express, Inc. states that no counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

(1) an employer ceases to exist by reason of—

(A) a change in corporate structure described in section 4069(b) [29 U.S.C. § 1369(b)], or

(B) a change to an unincorporated form of business enterprise, if the change causes no interruption in employer contributions or obligation to contribute under the plan, or

(2) an employer suspends contributions under the plan during a labor dispute involving its employees.

For purposes of this part, a successor or parent corporation or other entity resulting from any such change shall be considered the original employer.

29 U.S.C. § 1398.

INTEREST OF *AMICUS CURIAE*

Midwest Motor Express, Inc. ("Midwest") is an interstate motor carrier of freight located in Bismarck, North Dakota, operating in thirteen states. Midwest is interested in this case because the Ninth Circuit decision conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law, nor intended by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Midwest was involved in a labor dispute that lasted nearly three years, from August 12, 1991, until April 15, 1994. ERISA § 4218(2), 29 U.S.C. § 1398 (2). In Midwest's situation, the Ninth Circuit rule that the statute of limitations period on withdrawal liability collection actions begins to run from the date of complete withdrawal would have deprived the Central States Southeast and Southwest Areas Pension Fund ("Central States")

of nearly one half of the six-year statute of limitations. ERISA § 4301(f), 29 U.S.C. § 1451(f). This would encourage a prudent pension fund to assess withdrawal liability as soon as possible to protect itself against the running of the statute. Under those circumstances, the subsequent suit for the collection of withdrawal liability either would have overwhelmed Midwest or would have forced it to capitulate to union demands it otherwise might have resisted in the absence of the lawsuit. By contrast, the rule regarding the accrual of a claim advocated by Petitioner and applied in the District of Columbia Circuit, among others, allowed Central States to observe the labor dispute exception without losing any part of its statute of limitations.

The resolution of the case at bar has serious implications for the continued viability of the labor dispute exception to withdrawal liability, and that resolution should ensure that ERISA not be interpreted in such a manner as to undermine the collective bargaining process.

Accordingly, *amicus* believes it will bring insights and information beyond what is presented by Petitioner and Respondents, which will be useful to the Court in deciding the issue presented.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision that the statute of limitations begins to run from the date of complete withdrawal is fundamentally flawed because it is in direct conflict with the ruling of this Court in *Milwaukee Brewery Workers' Pension Fund v. Jos Schlitz Brewing Co.*, 513 U.S. 414 (1995). In *Jos Schlitz Brewing Co.*, the Court stated that a withdrawing employer owes nothing to a pension fund until such time as the fund demands that the employer pay its withdrawal liability. *Id.* at 423. Moreover, the Ninth Circuit's holding that the pension fund's cause of action accrues as of the date of the employer's withdrawal conflicts with the labor dispute exception codified

in ERISA and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA.

Finally, the Seventh Circuit's decision in *Central States, Southeast and Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. den.*, 510 U.S. 1115 (1994), provides a better alternative to the Ninth Circuit's flawed holding regarding accrual of the causes of action than the alternative presented by the Third Circuit's decision in *Board of Trustees of the District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994). The Third Circuit's approach adopts an analogy to installment payments which has no warrant in ERISA and is factually inapposite to the case at bar. In sum, a cause of action accrues at the time the employer fails to make a demanded payment, and the six-year statute of limitations runs from that date for the entire amount of the withdrawal liability.

ARGUMENT

I. THE NINTH CIRCUIT HAS ADOPTED AN INAPPROPRIATE STANDARD FOR DETERMINING THE ACCRUAL OF A CAUSE OF ACTION FOR WITHDRAWAL LIABILITY.

Under ERISA, as amended by MPPAA, an employer withdrawing from an under-funded multiemployer pension plan is responsible for paying the pension fund the employer's pro rata share of the funding deficit, so-called withdrawal liability, after it withdraws. ERISA § 4201, 29 U.S.C. § 1381. The pension fund has the right to sue the withdrawing employer to recover the withdrawal liability if the employer fails to pay on demand. ERISA § 4301(a)(1), 29 U.S.C. § 1451(a)(1). Section 4301(f) of ERISA, 29 U.S.C. § 1451(f), gives the pension fund six years to sue the withdrawing employer from the time the fund is injured. ERISA § 4301(f), 29 U.S.C. § 1451(f). ERISA does not specify, however, what act

or omission creates a claim upon which the pension fund can sue, thereby starting the running of the six-year statute of limitations.

In the case at bar, *Bay Area Laundry & Dry Cleaning Pension Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996), the Ninth Circuit held that "the limitations period begins to run from the date of complete withdrawal. . . ." *Bay Area Laundry*, 73 F.3d at 973. The Ninth Circuit's holding, however, directly conflicts with this Court's statement in *Jos. Schlitz Brewing Co.*, that "the statute [ERISA] makes clear that the withdrawing employer *owes nothing until its plan demands payment. . . .*" *Jos. Schlitz Brewing Co.*, 513 U.S. at 423 (emphasis added). The Ninth Circuit's decision in this case assumes a diametrically opposed view of a withdrawing employer's obligations, which view, if allowed to prevail, threatens serious harm to the statutory framework established by Congress to protect the participants and beneficiaries of multiemployer pension plans. Moreover, the practical implications of the Ninth Circuit rule threaten to imbalance the system of collective bargaining between employers and their unionized employees which frequently depends on the parties using the economic weapons at their command to attain their bargaining objectives. Until *Ferbar*, multiemployer pension funds have had little reason to inject themselves into collective bargaining disputes, but the Ninth Circuit has offered multiemployer pension funds a perverse incentive to interfere in labor disputes to the unique detriment of the employer. This outcome is directly antagonistic to the statutory mandate that multiemployer pension funds may not assess withdrawal liability against an employer solely because the employer has suspended contributions on account of the pendency of a labor dispute. ERISA § 4218(2), 29 U.S.C. § 1398(2).

A. The Ninth Circuit's Analysis of ERISA's Statute of Limitations is Fundamentally Flawed.

For a claim for withdrawal liability to accrue, there must first be an injury to the fund. This is explicit in

section 4301(a)(1) of ERISA, 29 U.S.C. § 1451(a)(1), which states in pertinent part, "[a] plan fiduciary, employer, plan participant, or beneficiary, who is *adversely affected by the act or omission of any party* under this subtitle with respect to a multiemployer plan . . . may bring an action for appropriate legal or equitable relief or both." ERISA § 4301(a)(1) 29 U.S.C. § 1451(a)(1) (emphasis added). ERISA makes clear that a potential plaintiff must be "adversely affected" by "an act or omission" of a person, such as a withdrawing employer, in order for a claim against the withdrawing employer to accrue. In *Ferbar*, the Ninth Circuit, relying on its holding in *Board of Trustees of the Construction Laborers Pension Trust Fund v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), ruled, in effect, that the fund was adversely impacted by the employer's withdrawal from the fund. *Ferbar*, 73 F.3d at 973. In *Thibodo*, the Ninth Circuit rejected an alternative approach to the question of when the statute of limitations started running on the grounds that "[i]t is anomalous to conclude that the limitations period of [ERISA] § 1415(f) was running against the Trustees before they had a right to sue." *Thibodo*, 34 F.3d at 917. The Ninth Circuit decided *Thibodo* without the benefit of this Court's decision in *Jos. Schlitz Brewing Co.*, but, in light of that ruling, it is clear that the Ninth Circuit has done in *Ferbar* what it found "anomalous" in *Thibodo*. Under *Jos. Schlitz Brewing Co.*, the employer owed nothing, and therefore the fund had not been injured, until the fund had demanded payment. *Jos. Schlitz Brewing Co.*, 513 U.S. at 423. Nonetheless, the Ninth Circuit's ruling in *Ferbar* indicates that the statute of limitations starts running against the pension fund before it is owed any withdrawal liability, much less before it has been injured by non-payment of the liability. This fundamental conflict between the Ninth Circuit's decision in *Ferbar* and this Court's decision in *Jos. Schlitz Brewing Co.* requires the reversal of *Ferbar*.

B. The Ninth Circuit's Rule Regarding Accrual of a Cause of Action For Withdrawal Liability Encourages Multiemployer Pension Funds to Interfere in Collective Bargaining Disputes.

If a pension fund determines during the pendency of a labor dispute that the employer has permanently ceased contributing and that at the end of the labor dispute the employer will cease to have an obligation to contribute, the pension fund may decide that the employer has withdrawn as of the date it ceased contributing. Under the rule accepted in the District of Columbia,[2] Seventh *(Navco)* and Third Circuits *(Kahle Engineering)*, there is no cause for concern by the pension fund: the statute of limitations does not begin to run until such time as the pension fund makes a demand on the withdrawing employer. Under the Ninth Circuit approach, however, the pension fund must make its decision regarding withdrawal, with its attendant difficulties of interpreting collective bargaining disputes and the intentions of the employer, fairly soon after the suspension of payments. This is not an abstract concern. At the expiration of Midwest's collective bargaining agreement in 1991, Midwest bargained with its employees' union for several months until the employees went out on strike. Midwest stopped contributing to its multiemployer fund as soon as its employees went out on strike on August 12, 1991, as it was allowed to do under its pension fund's trust agreement. However, it was after nearly three years had passed, and the National Labor Relations Board certified that Midwest's employees had decertified the union on April 15, 1994, that the pension fund decided that Midwest had withdrawn in 1991. Until that time, Central States was barred from assessing withdrawal liability against Midwest by section 4218(2) of ERISA, 29 U.S.C. § 1398(2), so long as Midwest had only suspended its contributions during the dispute rather than permanently withdrawn from the fund.

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[2] *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. den.* 493 U.S. 918 (1989).

Under the Ninth Circuit rule, Central States would have lost half of its statute of limitations during the strike.

The most serious danger presented by the Ninth Circuit rule, however, is not that pension funds will be left at the end of a labor dispute with no recourse against a withdrawing employer. While that is possible, and undesirable, the danger really lies with the funds' reasonable efforts to protect themselves from precisely that outcome. If, under the Ninth Circuit rule, a fund fears that a prolonged labor dispute is going to result in a withdrawal of the employer from the fund some years after the initial cessation of contributions, the prudent pension fund should demand withdrawal liability at once to protect itself against the running of the statute. The filing of a muli-million dollar suit[3] against the employer while the employer is fighting a strike either would overwhelm the employer or force it to capitulate to union demands it might otherwise resist in the absence of the lawsuit. This scenario conflicts with the labor dispute exception and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA. Congress clearly intended that ERISA, as amended by MPPAA, should not undermine the collective bargaining process: "Multiemployer plans are creatures of collective bargaining. The committee believes: that the integrity of the collective bargaining process must be preserved to the utmost extent consistent with assuring the financial soundness of multiemployer plans to meet benefit commitments." H.R. Rep. No. 869, 96th Cong., 2nd Sess. 51, 63, *reprinted in* 1980 U.S. Code Cong. & Ad. News 2919, 2931.

This interference with the collective bargaining process is a result which should, and can, be avoided while protecting the rights of pension plans to recover withdrawal liability. All that needs to be done is to adopt the rule

[3] Multi-million dollar withdrawal liability assessments are not uncommon in some industries, such as trucking.

on accrual of withdrawal liability claims developed and applied by the District of Columbia (*Joyce*), Seventh (*Navco*) and Third Circuits (*Kahle Engineering*). If the cause of action accrues only when the pension fund demands payment and the employer fails to comply, then the fund can stay out of the labor dispute, as Congress intended when it enacted section 4218(2) of ERISA, 29 U.S.C. § 1398(2), without putting its ability to recover withdrawal liability at risk.

II. THERE IS NO BASIS IN LAW OR FACT FOR ADOPTION OF A STATUTE OF LIMITATIONS THAT BEGINS TO RUN ANEW FOR EACH PAYMENT MISSED BY A WITHDRAWING EMPLOYER.

The District of Columbia Circuit ruled in *Joyce* that the statute of limitations for suits to collect withdrawal liability begins to run from the date the withdrawing employer has failed to make a payment of withdrawal liability demanded by a pension fund. *Joyce*, 871 F.2d at 1124. Both the Seventh and Third Circuits have adopted the holding and reasoning of the D.C. Circuit. Although the Seventh and Third Circuits agree that *Joyce* correctly decided when the cause of action accrues, they disagree whether there is a unitary claim for the entire amount of withdrawal liability or whether a separate claim arises for each payment under a fund's amortization schedule.

In 1993, the Seventh Circuit held, in *Navco*, that "[t]he pension fund had only one *claim* against the employer . . .: the amount of withdrawal liability. Although a fund may permit an employer to amortize this sum over 20 years, 29 U.S.C. § 1399(c)(1)(B), the whole amount is presumptively due at the outset." *Navco*, 3 F.3d at 172 (emphasis in original). Under *Navco*, therefore, a pension fund has six years to sue a withdrawing employer for the entire amount of withdrawal liability beginning

from the date the employer misses its first scheduled payment.

A year later, in *Kahle Engineering*, the Third Circuit held that

> under the statutory scheme established by the MPPAA, a plan sponsor has six years from the date a payment is due to sue for its recovery. Absent a decision by the [pension] Fund to accelerate, the cause of action for payments not yet due does not begin to run when the first such payment is missed.

Kahle Engineering, 43 F.3d at 861. The Third Circuit's approach is based upon an extended analogy between the voluntary amortization of withdrawal liability which a pension fund must offer a withdrawing employer and an installment contract. This analogy is flawed as a matter of law, and even if appropriate on the facts of *Kahle*, has no appropriate application in this case.

First, the installment plan analogy drawn by the Third Circuit in *Kahle Engineering* is flawed because there is no basis in the statute for such an analogy. As noted by the Seventh Circuit in *Navco*, "[t]he [payment] schedule under [29 U.S.C.] § 1399(c), by contrast, is not contractual; the employer did not assent to a longer period for payment and suit." *Navco*, 3 F.3d at 172. More important, in the case at bar there is no factual predicate for application of the analogy at all. In some cases, such as *Kahle Engineering* itself, in which a withdrawing employer has made at least one periodic payment of withdrawal liability according to the amortization table provided by the pension plan, there may be a factual and legal basis for the Third Circuit's installment payment statute of limitations.[4] Under such circumstances, there may be some basis for assuming that there has been some quasi-contractual offer, acceptance and consideration sufficient to justify the treatment of the payment of withdrawal liability as an installment payment plan.[5] The case at bar, however, is not such a case: the withdrawing employer made no payments of any kind towards satisfaction of its withdrawal liability. *Ferbar*, 73 F.3d at 972. Accordingly, there is no basis for assuming that the employer and the pension fund took any action that could support the imposition of the installment payment statute of limitations on the parties. In this case, the pension fund offered an amortization schedule, as required by ERISA, but the employer never took any action to accept the extended payment schedule. Under the circumstances of the case at bar, imposition of the *Kahle Engineering* approach to the statute of limitations is without any justification.

[4] In *Kahle Engineering*, the employer paid at least one quarterly payment as required by the pension plan. *Kahle Engineering*, 43 F.3d at 855.

By contrast, the approach adopted by the Seventh Circuit in *Navco* fits *Ferbar* exactly. In its *Kahle Engineering* opinion, the Third Circuit objected to the *Navco* approach because, it argued, the Seventh Circuit had made acceleration of the withdrawal liability debt at default mandatory. This is simply inaccurate. ERISA itself left acceleration to be optional with the pension fund.[6] Under the *Navco* approach, the pension plan has the option of suing only for the amount of the one payment that has been missed, but, if the pension plan chooses to sue, it

[5] The proffer of an amortization alternative to a lump-sum payment could be considered an offer which the withdrawing employer accepts by making the demanded payments. This offer and acceptance is supported by consideration: the employer pays interest and the pension fund accepts deferred payment of the total liability. Although these quasi-contractual aspects of the process may be overstated, in *Kahle Engineering* they provide some justification for the installment-payment approach.

[6] Section 4219(c)(5) of ERISA, 29 U.S.C. § 1399(c)(5) provides that "[i]n the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest . . . ." ERISA § 4219(c)(5), 29 U.S.C. § 1399(c)(5) (emphasis added).

must do so for any remaining amounts that go unpaid within six years of the original default. This hardly makes mandatory what is optional under the statute. If a pension plan wishes to rehabilitate the delinquent employer it may do so, but it must sue for the entire amount of withdrawal liability within six years. This is hardly draconian; rather it sets a reasonable time limit within which the pension plan may exercise its efforts to recover the maximum amount from the employer before resorting to litigation. If the pension fund cannot work something out within that time, or even a fraction of that time, common sense suggests that nothing can be worked out.

CONCLUSION

The Ninth Circuit's analysis of when a cause of action for withdrawal liability accrues is fundamentally flawed because it is in direct conflict with the ruling of this Court in *Jos. Schlitz Brewing Co.* that a withdrawing employer owes nothing to a pension fund until such time as the fund demands that the employer pay its withdrawal liability. Moreover, the Ninth Circuit's holding that the pension fund's cause of action accrues as of the date of the employer's withdrawal conflicts with the so-called labor dispute exception codified in ERISA and creates the potential for serious and irreparable damage to the system of collective bargaining to a degree not provided for by labor law nor intended by ERISA

Finally, the Seventh Circuit's *Navco* decision provides a better alternative to the Ninth Circuit's flawed holding regarding accrual of the cause of action than the alternative presented by the Third Circuit's decision in *Kahle Engineering*. The Third Circuit approach adopts an analogy to installment payments which has no warrant in ERISA and is factually inapposite to this case. In sum, under ERISA's withdrawal liability provisions, a cause of action accrues at the time the employer fails to make a demanded payment, and the six-year statute of limitations

runs from that date for the entire amount of the withdrawal liability.

Respectfully submitted,

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OCTOBER TERM, 1996

BOARD OF TRUSTEES, BAY AREA LAUNDRY AND DRY CLEANING PENSION TRUST FUND,
Petitioner,

v.

FERBAR CORPORATION OF CALIFORNIA, INC.; STEPHEN BARNES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF JOHN T. JOYCE, *ET AL.*, TRUSTEES OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of this Court, John T. Joyce and the other Trustees of the Bricklayers and Trowel Trades International Pension Fund ("IPF") respectfully move this Court for leave to file the accompanying brief as *Amicus Curiae* in support of Petitioner. Petitioner consents to the filing of this brief; Respondents do not.

The IPF successfully litigated the MPPAA[1] withdrawal liability statute of limitations question now before this Court in *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). *Sandoz*'s answer to that question—the one advanced by the IPF—was explicitly rejected by the Ninth Circuit below. The IPF and its participants have an interest in preserving their

---

[1] "MPPAA" refers to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, which amended the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

victory in *Sandoz*, which will be turned into a *de facto* defeat if this Court affirms the judgment below.

The IPF, a multiemployer ERISA pension fund that is not "fully funded" (such that its employers may be subject to withdrawal liability under MPPAA), operates in the "construction industry," within the meaning of MPPAA. 29 U.S.C. § 1383(b). The IPF receives contributions from over 7,000 participating employers located in every state and provides benefits to over 16,000 participants. Over 90% of these employers have seven or fewer employees, and many operate seasonally.

It is difficult for the IPF to collect withdrawal liability from such companies in the construction business, an industry which, as Congress has recognized, is notable for its transitory nature. *Sandoz*, 871 F.2d at 1123. These difficulties are compounded by the IPF's status as a "construction industry" fund governed by different and more stringent rules for determining when an employer has "withdrawn."

The Ninth Circuit's rule adds to these burdens by engrafting a statute of limitations restriction that, we submit, is contrary to MPPAA's text. The IPF's position prevailed in *Sandoz*, and the IPF believes that this Court would benefit from having that position before it in passing on the merits of the present Petition.

Respectfully submitted,

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July 17, 1997

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BRIEF OF JOHN T. JOYCE, *ET AL.*, TRUSTEES OF THE BRICKLAYERS AND TROWEL TRADES INTERNATIONAL PENSION FUND AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE* *

John T. Joyce and the other Trustees of the Bricklayers and Trowel Trades International Pension Fund ("IPF" or "Fund") successfully litigated *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119 (D.C. Cir.), *cert. denied*, 493 U.S. 918 (1989). *Sandoz* presented a question that was then of first impression: when does a cause of action "arise" (29 U.S.C. § 1451(f)(1)) for statute of limitations purposes in a MPPAA[1] withdrawal liability case?

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* This brief was authored in whole by counsel for *amicus curiae*. No person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

[1] "MPPAA" or the "Act" refers to the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381-1461, which

Sandoz's answer to that question—the one advanced by the IPF—was explicitly rejected by the Ninth Circuit below. The IPF and its participants have an interest in preserving their 1989 victory in *Sandoz*, which will be transformed into a *de facto* defeat if this Court affirms the judgment below.

INTRODUCTION

The IPF is a multiemployer ERISA pension fund that provides pension and other benefits to over 16,000 participants. It has offices only in Washington, D.C., but receives contributions from over 7,000 participating employers located in every state. Over 90% of these employers have seven or fewer employees, and many operate seasonally, resulting in a constant fluctuation of hours reported to the IPF upon which contributions must be paid.

Because the IPF is not "fully funded," its employers may be subject to certain MPPAA liabilities that the Act requires the IPF to collect upon an employer's "withdrawal" from the Fund. A MPPAA "withdrawal" occurs in most industries when an employer "permanently ceases to have an obligation to contribute" to the plan *or* "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a). However, for "construction industry" funds like the IPF, the MPPAA rule is more complex and stringent: a construction industry employer "withdraws" from such a plan only if it (1) "ceases to have an obligation to contribute under the plan" *and* (2) "continues to perform work in the jurisdiction . . . of the type for which contributions were previously required, or . . . resumes such work within 5 years." 29 U.S.C. § 1383(b).[2]

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amended the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA").

[2] Congress enacted this provision in order to accommodate construction industry employers that moved from one locality to the next, depending upon work demand. H.R. Rep. No. 96-869, pt. 1, at 75-76 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2943-44; Senate Comm. on Labor and Human Resources, 96th Cong., Summary and Analysis of Consideration of S. 1076 at 13 (Comm. Print 1980); *see also Sandoz*, 871 F.2d at 1123.

IPF employers report their level of employment, and resulting contribution obligations, on standard forms submitted to the Fund. When an employer ceases to report contributions, the IPF does not know if the employer has "withdrawn" from the IPF within the meaning of § 1383(b), or has merely moved on to a construction project in another state.[3] As a result of the restrictive statutory definition of "withdrawal" in the construction industry, it is usually impossible for the IPF to impose liability on an employer unless the Fund receives information that the company has gone "non-union" in the jurisdiction—refuses to sign a collective bargaining agreement and continues to do the same type of work (*e.g.*, brick or tile laying) in the same jurisdiction.

SUMMARY OF ARGUMENT

Sandoz held that an ERISA plan's "cause of action" for collection of withdrawal liability for MPPAA statute of limitations purposes "arises" only after the plan unsuccessfully demands that the employer pay its withdrawal liability. The Ninth Circuit here, following its prior decision in *Board of Trustees of Construction Laborers Pension Trust v. Thibodo*, 34 F.3d 914 (9th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995), rejected *Sandoz* and held instead that the statute of limitations begins to run on the date of an employer's "withdrawal" from the plan. *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971 (9th Cir. 1996). *Sandoz* (but not the Ninth Circuit) faithfully adhered to "the words of [ERISA's] text regarding the *specific* issue under consideration" (*Mertens v. Hewitt Associates*, 508 U.S. 248, 261

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[3] Even if that employer operates without a collective bargaining agreement in another state, there is no "withdrawal" because of the "continues to perform work in the jurisdiction" requirement of 29 U.S.C. § 1383(b).

(1993) (emphasis in original)), and remained true to the plain meaning of MPPAA's language (*Milwaukee Brewery Workers' Pension Plan v. Jos. Schlitz Brewing Co.*, 513 U.S. 414 (1995) ("*Schlitz*")).

MPPAA contains a carefully crafted and precise withdrawal liability scheme that culminates in arbitration. Contrary to the Ninth Circuit's approach, "withdrawal," without more, does not require an employer to pay anything. *Schlitz*, 513 U.S. at 423. Nor does it in any way "adversely affect" the plan (the statutory precondition for a plan's suit against the employer); rather, it simply sets in motion MPPAA's procedural machinery. *Sandoz*, 871 F.2d at 1124.

Thibodo also opines that "[t]here is little reason for the second clause [of 29 U.S.C. § 1451(f), which provides that the limitations period runs 3 years from the time the plan acquired knowledge] if the cause of action does not come into existence until demand for payment is made and refused." 34 F.3d at 918. But such a construction again ignores the statutory text, which states that § 1451 applies not only to withdrawal actions, but also to many other types of suits, including transfer of plan assets, reorganization of plans and benefits after termination. *See Sandoz*, 871 F.2d at 1125.

The Ninth Circuit's failure to adhere to MPPAA's text in the above respects alone warrants reversal. Beyond that, the court of appeals' decision is bottomed on a series of fundamental errors. For example, the *Thibodo* panel's conclusion was driven by its "view" that *Sandoz* "improperly" places the running of the statute of limitations period in the plan's "control." 34 F.3d at 917, 918 n.7. That view rests on a misunderstanding of the statutory scheme, because the "[a]s soon as practicable" requirement of MPPAA means that an arbitrator, not the plan, controls the timeliness issue. Moreover, the MPPAA statute of limitations is no more "improper" than analogous statutes

sustained by this Court in *Rawlings v. Ray*, 312 U.S. 96 (1941), and *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967).

ARGUMENT

Under MPPAA, an action for collection of withdrawal liability must be brought "6 years after the date on which the cause of action arose." 29 U.S.C. § 1451(f)(1). The District of Columbia Circuit, after a meticulous analysis of the statutory language, ruled that a cause of action "arises" only after the plan first notifies the employer of the withdrawal liability and the employer then fails to make the payment demanded. *Sandoz*, 871 F.2d at 1124. Dismissing the employer's argument that the statute ran from the time of "withdrawal," the *Sandoz* court concluded that before the employer refuses to pay, no money is "due and owing" (29 U.S.C. § 1401(b)(1)) to the plan by the employer. 871 F.2d at 1122, 1124; *accord Schlitz*, 513 U.S. at 423 ("the statute makes clear that the withdrawing employer owes nothing until its plan demands payment"). Because no money is due upon "[t]he employer's complete withdrawal," that event, "without more, is an occurrence that hardly affects the plan adversely"; until the plan is so affected, it cannot sue the employer under MPPAA to collect. *Sandoz*, 871 F.2d at 1122, 1124.[4]

The Ninth Circuit below rejected *Sandoz* on the basis of its prior controlling decision in *Thibodo*.[5] The *Thibodo*

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[4] The Seventh and Third Circuits subsequently followed *Sandoz* in *Central States, Southeast & Southwest Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994), and *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994).

[5] Because the Ninth Circuit deemed *Thibodo* to have "spoken dispositively on this issue" (*Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 73 F.3d 971, 973 (9th Cir. 1996)) and its analysis to control this case, we discuss the two cases interchangeably in this brief.

court decided that the statute of limitations "begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met," that is, on the day "withdrawal" occurs. 34 F.3d at 917. The court listed several factors which led it to that conclusion. First, even in the construction industry, determining whether an employer has withdrawn supposedly is "relatively straightforward." *Id.* at 917-18. Second, the court saw "no reason . . . to choose a date of limitations that is in the control of the plaintiff." *Id.* at 918. Third, there would be "little reason for" the second clause of the limitations provision (3 years from discovery) if the 6-year period were triggered by the fund's demand. *Id.*

As we shall demonstrate, the Ninth Circuit's opinion is at odds with the plain language of the statute and is otherwise fatally flawed.

I. ERISA'S PLAIN LANGUAGE REQUIRES REVERSAL

ERISA, as amended by MPPAA, "provides an elaborate system to ensure the financial integrity of multiemployer pension funds." *Sandoz*, 871 F.2d at 1120. MPPAA discourages employers from withdrawing from a "financially shaky plan" by "impos[ing] a withdrawal charge on all employers withdrawing from an underfunded plan." *Schlitz*, 513 U.S. at 416-17. And, "it set forth a detailed set of rules for determining, and collecting, that charge." *Id.* at 417.

These rules first come into play when the plan calculates the liability, and then "notif[ies]" the employer of (i) the amount of the liability and (ii) the schedule for liability payments and "demand[s] payment in accordance with the schedule." 29 U.S.C. § 1399(b)(1). Within 90 days of receiving the demand, the employer may ask the plan to review the determination. 29 U.S.C. § 1399(b)(2)(A). The plan shall reply "[a]fter a reasonable review." 29

U.S.C. § 1399(b)(2)(B). In the interim, the employer must begin making payments according to the schedule, notwithstanding any dispute over the fact or amount of liability. 29 U.S.C. § 1399(c)(2).[6] Thereafter, either party may initiate arbitration to resolve any outstanding disputes. 29 U.S.C. § 1401(a)(1). Arbitration is central to the statutory mechanism by which an employer may challenge the fund's assessment of withdrawal liability.[7] Only then may the plan sue to "enforce, vacate, or modify" the arbitrator's award. 29 U.S.C. § 1401(b)(2).[8]

MPPAA "carefully distinguishes between the circumstances that define complete withdrawal and those which give rise to a cause of action." *Sandoz*, 871 F.2d at 1123. In the construction industry, "withdrawal" occurs when an employer "ceases to have an obligation to contribute" and resumes work in that jurisdiction "within 5 years" of that date. 29 U.S.C. § 1383(b)(2). In contrast, a cause of action can "arise" under MPPAA's withdrawal procedures only *after* (1) an "arbitration proceeding" (29 U.S.C. § 1401(a)(1)), (2) the failure of an employer to make interim payments (29 U.S.C. § 1399(c)(2)), or (3) a "default" by the employer in making a required payment (29 U.S.C. § 1399(c)(5)). Until one of these three statutorily defined events occurs, a plan cannot "bring an

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[6] If the employer fails to make interim payments, the fund may sue to compel payment, consistent with MPPAA's "pay now, dispute later" procedure. *Teamsters Joint Council No. 83 v. CenTra, Inc.*, 947 F.2d 115, 119 (4th Cir. 1991).

[7] MPPAA mandates that the assessment be made "[a]s soon as practicable" (29 U.S.C. § 1399(b)(1)), a requirement that may be raised by the employer as a defense in the statutory arbitration. *See, e.g., Ludington News Co.*, 9 Employee Benefits Cas. (BNA) 1913, 1919 n.9 (1988) (Cornelius, Arb.).

[8] If arbitration is not initiated, the amounts demanded by the plan shall be "due and owing on the schedule set forth by the plan," and the plan then "may bring an action in a State or Federal court of competent jurisdiction for collection." 29 U.S.C. § 1401(b)(1).

action" against the employer to collect withdrawal liability. 29 U.S.C. §§ 1401(b)(1), 1401(b)(2).

The text of MPPAA's "elaborate system" compelled the *Sandoz* court to conclude that it was only "Sandoz's uncured failure to pay the sum demanded" that "adversely affected the plan, thus giving rise to a cause of action." 871 F.2d at 1120, 1122.[9] The District of Columbia Circuit's reliance on the statutory language comports with ERISA's "carefully crafted and detailed enforcement scheme," which requires adherence to "the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 U.S. at 254, 261 (emphasis in original). It is equally consistent with this Court's teachings that it is the texts of ERISA and its MPPAA amendments, not their "basic objectives," that control. In *Schlitz*, for example, this Court concluded that the statute's language required interest to be calculated from the first day of the plan year following withdrawal, despite the plan's argument that such an "interpretation works against the basic objective of the statute, requiring a withdrawing employer to pay a fair share of the underfunding." 513 U.S. at 422, 425. Likewise, in *Mertens*, this Court looked to "the words of [ERISA's] text" rather than to its "basic purpose" in declining to read into the statute a cause of action against nonfiduciaries. 508 U.S. at 261; *see also Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 117 S. Ct. 1513, 1515 (1997).

The Ninth Circuit's rationale does not rest on the statutory language, as it must under *Mertens* and *Schlitz*.

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[9] *Sandoz* did not have to reach the subsidiary question of how the limitations period applies once the employer fails to pay the withdrawal liability demanded by the plan. We therefore do not address it, except to note our agreement with Petitioner that the Third Circuit's answer in *Board of Trustees of District No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3d Cir. 1994), is the correct one under the reasoning of *Sandoz*.

Thus, *Thibodo* baldly concluded that "the limitations period . . . begins to run from the date on which the conditions for complete withdrawal specified in § 1383(b)(2) have been met" (34 F.3d at 917), without identifying the event that gives rise to a "cause of action" (29 U.S.C. § 1451(f)) for the purpose of computing the statute of limitations. The *Thibodo* panel drew support for this conclusion from its "view" (unsupported by anything in the statute) that its construction avoided "improperly plac[ing] the running of the limitations period in the control of the plaintiff." 34 F.3d at 917. But under *Schlitz* and *Mertens*, such a "view" cannot trump the statutory text.

The *Thibodo* court further misread the statute when it found "little reason for the second clause [of 29 U.S.C. § 1451(f)] if the cause of action does not come into existence until demand for payment is made and refused." 34 F.3d at 918. MPPAA on its face supplies the complete refutation:

> If the [time] bar applied only to plan sponsors' suits to collect delinquent withdrawal liability payments, the argument would carry some weight. However, the time bar applies to "[a]n action under this section." Section 1451, situated at the beginning of the subtitle part entitled "enforcement," is hardly limited to the type of suit before us. Indeed, section 1451 applies to suits brought by a wide variety of parties . . . [and] extends to matters far beyond collection of withdrawal liability [including, among other things, transfer of plan assets, reorganization of plans and benefits after termination of plans].

Sandoz, 871 F.2d at 1125.

II. EVEN IF THE ACT'S TEXT DID NOT COMPEL REVERSAL, THE JUDGMENT COULD NOT STAND

The court of appeals' failure to give effect to the "words of [ERISA's] text" alone requires reversal under this Court's precedent. While that is dispositive, we are con-

strained to point out that the Ninth Circuit's rationale fails even on its own terms.

First, the Ninth Circuit's conclusion that its result would "not lead to debilitating uncertainty" (*Thibodo*, 34 F.3d at 917) misapprehends the difficulty of determining when an employer has "withdrawn" under the statutory language governing the construction industry. *Sandoz* is a good example of that very difficulty. Clyde Sandoz Masonry Contractors, Inc. ("Sandoz"), a contractor located in Phoenix, Arizona, had been a participating employer in the IPF since at least 1975.[10] This contractor ceased doing business under the name "Sandoz" and stopped making contributions to the IPF in 1981. A new corporation, operating under the name "Griffith Masonry," continued in the same trade as Sandoz in the Phoenix area without being a party to a collective bargaining agreement. During a June 1987 meeting in Phoenix, the IPF Executive Director fortuitously learned that certain Phoenix area employers had gone "non-union"; only later did he discover specifically that Sandoz was operating "non-union" as "Griffith Masonry." Promptly thereafter, the IPF calculated Sandoz's withdrawal liability to be over $250,000, and sent a letter to Sandoz demanding payment. As *Sandoz* demonstrates, it is factually incorrect to say that detecting construction industry withdrawals is "straightforward" (*Thibodo*, 34 F.3d at 918).

Second, *Thibodo* deemed the *Sandoz* result to be "improper" because it purportedly "places the running of the limitations period in the control of the plaintiff." 34 F.3d at 917, 918 n.7. The Ninth Circuit cited no authority for this proposition, which ignores analogous precedent from this Court. When confronted with a strikingly similar statute of limitations, this Court in *Rawlings v. Ray*, 312 U.S. 96 (1941), read the operative language as did *Sandoz*. In *Rawlings*, the Comptroller of the Currency

[10] These facts are taken from the *Sandoz* Record on Appeal.

declared an Arkansas bank insolvent and imposed an assessment on its shareholders on November 6, 1935, payable on or before December 13, 1935. The shareholders failed to pay and, on December 7, 1938, the receiver brought suit. The applicable statute of limitations provided that an action must be commenced "within three years after the cause of action shall accrue." *Id.* at 97. Chief Justice Hughes gave short shrift to the shareholders' argument that the suit was time-barred by the November 6, 1935 assessment:

> While the assessment was made on November 6, 1935, it was expressly made payable on or before December 13, 1935. *Respondent was allowed until that date to pay and prior thereto suit coula not be maintained against him. Hence the statute of limitations did not begin to run until December 13, 1935 [upon failure to pay], and the suit was in time.*

Id. at 98 (emphasis added). Here, as in *Rawlings*, an action does not "accrue" under MPPAA until demand has been made on the employer *and* the employer fails to pay.

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967), is likewise instructive in this regard. There, a government contractor sued for wrongful denial of a contract claim by the Armed Services Board of Contract Appeals. The contract at issue provided for mandatory administrative review of disputes arising thereunder, with the final decision subject to judicial review. The contractor sought such judicial review more than six years after he had completed performance of the contract. The Government moved to dismiss, relying upon a limitations period requiring that civil actions against the United States be filed "within six years after the right of action first accrues." *Id.* at 507. This Court held that the claim "accrued" at the time of the "final decision" of the administrative body, not at the time of contractual performance:

> To hold that the six-year time period runs from the completion of the contract, as the Government in-

> sists, would have unfortunate impact. The contractor is compelled to resort to administrative proceedings which may be protracted and which may last not only beyond the completion of the contract but continue for more than six years thereafter. If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This would be true whether he wins or loses before the board of appeals. Even if he prevailed there and was granted the equitable adjustments he sought, the Government would be immune from suit to enforce the award if more than six years had passed since the completion of the contract. This is not an appealing result, nor, in our view, one that Congress intended.

Id. at 511, 514.

Like government contract claims that "accrue" under *Crown Coat* only after mandatory procedures are completed, a MPPAA cause of action "arises" only after the statutory arbitration concludes or, if arbitration has not been initiated, after the employer fails to make payments within the prescribed time. 29 U.S.C. §§ 1401(b)(2), 1401(b)(1). To accept the Ninth Circuit's contrary reasoning would have the "unfortunate impact" of requiring pension funds throughout the country to exhaust MPPAA's procedural requirements, only to find that the statute of limitations had run in the interim. *See Crown Coat*, 386 U.S. at 514.

Third, the Ninth Circuit's concern as to "plan control" has no statutory basis. The issue of timeliness under MPPAA *must* be presented to the arbitrator, who has the power to sustain a laches defense. 29 U.S.C. § 1401(a); *see Ludington News Co.*, 9 Employee Benefits Cas. (BNA) 1913, 1919 n.9 (1988) (Cornelius, Arb.). Thus, an employer that claims prejudice by virtue of a plan's undue delay in seeking to collect withdrawal liability can put that defense before the MPPAA arbitrator, who is particularly qualified to decide its merits.

Cf. United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

Crown Coat underscores the point. Echoing the *Thibodo* apprehension that the limitations period would be "in the control of the plaintiff," the United States argued that unless its reading of the statute prevailed, a contractor would have "unlimited discretion as to when to file his claim." 386 U.S. at 518. This Court was unpersuaded: because the standard government contract usually has "built-in time limits" for the processing of claims, no contractor could "delay unreasonably" in presenting a claim. *Id.* at 518-19 & n.13. So too does the "[a]s soon as practicable" language of MPPAA (29 U.S.C. § 1399(b)(1)) ensure that a plan does not sit on its claims to the employer's detriment.[11]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[11] A plan that unduly delays in taking appropriate action not only risks losing before the MPPAA arbitrator on the grounds of laches, but also "puts at risk the solvency of the plan and thus may invite a claim for breach of fiduciary duty" against the trustees. *Sandoz*, 871 F.2d at 1126.